

Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism

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This article analyzes two of the central claims made on behalf of drug courts: that they divert offenders from incapacitatory prison regimes and that they treat drug addicts. Taken together, these claims form the central justification of the drug court's existence and the basis of the court's unusual style of procedure. The court often resembles something between a revivalist meeting and an Alcoholics Anonymous session. The judge has tremendous discretion over the manner in which rewards and sanctions are meted out. Sanctions can involve repeating parts of the program, referral to a variety of progressively more residential treatment programs, or short terms of imprisonment. Liberal critics tolerate these sanctions and the courtroom "theater" more generally as part of their rejection of imprisonment as a solution to the severity revolution in penal policy. Yet the effect of formalizing the diversion process has led, not to increasing the numbers of drug addicts escaping the reach of the criminal justice system, but rather to bringing more low-level offenders into the system. Thanks to a policing based on risk management, law enforcement agents are pressured to divert offenders "up" into the system, rather than out of the system. This "net widening" effect results in increased numbers of offenders in drug court, many of whom have no criminal record and no record of addiction. Despite the increased number of citizens caught under the drug court net, liberal critics embrace the drug court's practice of invasive behavior modification as a therapeutic alternative to incarceration. The drug court, however, often functions more as a form of coercive drug monitoring than a drug treatment regime. These courts' express goal may be understood as an attempt to change the addicts' "social norms" by isolating the offender from malignant social influences and substitute the judge as the sole authoritative arbiter of appropriate behavior. Yet many of these "clients" may not be addicted to drugs, and so any treatment is better understood as a form of incapacitation in which the length of the treatment is often much longer than the alternative prison sentence. I suggest that the emphasis on therapy is blinding liberal critics to the

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highly incapacitative effects of the drug court. If they are to embrace the drug court, legal liberals need to reformulate a theory of punishment that is able to endorse the prison as an alternative to drug court. Of the available theories, some form of retributivism would appear to provide the most likely candidate. Such a theory would permit us to balance, on a court-by-court basis, the social harm of drug crime, the punishment imposed by a particular jurisdiction for such crime, and the alternative drug court sanction, so as to endorse or reject the drug court in terms of its treatment program and incapacitatory effect.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1481
II.	DRUG COURT PRACTICE AND PROCEDURE.....	1488
	A. <i>Central Elements of Drug Court Practice</i>	1489
	B. <i>The Drug Courts' Procedural Revolution</i>	1491
	1. <i>Therapeutic Relationship Between Judge and Offender</i>	1494
	2. <i>Provision of Treatment to Offenders</i>	1495
	3. <i>Expressing Empathy Using Praise and Sanction</i> ...	1496
III.	THREE MODELS OF CRIMINAL JUSTICE PRACTICE AND PROCEDURE.....	1503
	A. <i>The Three Models: Crime Control, Due Process, and Penal Welfarist</i>	1504
	B. <i>Drug Court Procedure Under the Three Models: Is the Drug Court a Real Court?</i>	1512
IV.	DO DRUG COURTS "TREAT" ADDICTED OFFENDERS?	1517
	A. <i>Drug Courts and the Disease Model of Addiction</i>	1518
	1. <i>Status and Choice: The Supreme Court Debate</i>	1524
	2. <i>Confinement: Treatment or Punishment</i>	1532
V.	MATCHING OFFENDER TO TREATMENT	1536
	A. <i>Drug Courts and Treatment</i>	1536
	B. <i>Drug Courts Screening Procedures</i>	1539
	1. <i>Coercion and Treatment</i>	1542
	2. <i>Treatment and Incapacitation</i>	1547
VI.	DO DRUG COURTS DIVERT OFFENDERS FROM PRISON?.....	1551
	A. <i>Drug Courts and Diversion</i>	1551
VII.	EVALUATING DRUG COURTS	1561
	A. <i>Three Models of Evaluation</i>	1561
	1. <i>Participation: Empathy, Heroism, and the Judge-as-Expert</i>	1562
VIII.	CONCLUSION	1574

I. INTRODUCTION

Drug courts may be the most significant penal innovation in the last twenty years. Emerging as a direct response to the “severity revolution” in penal policy,¹ they are an incredibly popular alternative to the War on Drugs.² They present a vibrant counter to the stalled legislative and litigative strategies developed to stem the flow of drug users into the criminal justice system. Rather than targeting the scope or application of drug statutes, drug courts work at the level of court process and procedure to re-institutionalize the penological goals of diversion and rehabilitation.

Since its first appearance in the early 1990s,³ the drug court movement has sought to restructure court practice and procedure. Its goal is to use the court’s sanctioning power to treat drug offenders rather than expedite the process of incarceration. Instead of challenging the drug laws, these courts operate within the current legislative framework but attempt to channel offenders away from prison and into treatment. Drug courts, therefore, constitute an alternative to the dominant liberal reaction to the War on Drugs—a reaction that either opposes the criminalization of drugs in general or seeks to end the disparate impact of drug laws on minority populations.

Created as problem-solving courts, drug courts operate at the pre- or post-trial stage to divert offenders into designated drug treatment programs.⁴ The court monitors the offenders’ progress by reconstituting the roles of judge, prosecutor, and defense counsel into partners in a treatment team.⁵ The team’s goal is to ensure that the defendant stays in treatment throughout the rehabilitation process. Drug courts enforce rehabilitation using an expressly therapeutic and non-adversarial approach to transform the courtroom.⁶ Reconstituted as a treatment center, the court becomes something akin to a cross between a revivalist meeting and Alcoholics Anonymous.⁷ The judge, as team leader, takes a direct and

¹ See generally Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217 (2001) (providing an overview of the history of the punishment practice in politically and economically developed nations from a practice focused on humanity to a practice focused on severity).

² DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 118, 132 (2001) (describing the War on Drugs as an event that “utterly transformed law enforcement in the USA”).

³ See JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT*, 39–44 (2001).

⁴ Hon. Sheila M. Murphy, *Drug Courts: An Effective, Efficient Weapon in the War on Drugs*, 85 ILL. B.J. 474, 476 (1997).

⁵ NOLAN, *supra* note 3, at 75–76.

⁶ *Id.* at 48–51, 76.

⁷ *Id.* at 111–32.

interventionist role in supervising the rehabilitation process.⁸ He or she becomes less a passive arbiter of guilt and innocence⁹ and more a partisan participant in the rehabilitative process.¹⁰ In an effort to establish a relationship with the offender, the judge “empathizes with,” is “concerned for,”¹¹ and “care[s] about” the defendant.¹²

So far, the shadow cast by the War on Drugs has shielded drug courts from criticism of a broad range of controversies.¹³ The court’s highly invasive therapeutic procedures escape censure so long as the court diverts offenders from prison and cures drug addicts. These liberal justifications depend upon claiming that the drug court presents a social-welfare type of safety net for drug addicts. The court provides a beneficial, therapeutic interaction between the courts and those problem people otherwise lost to society or the criminal justice system.

My goal is to place drug court practice and procedure in the context of traditional categories used to evaluate success in the criminal justice process. Drug courts do not appear in a conceptual vacuum. Generally, the relatively few critical assessments of the drug court movement have only chipped away at the edges of drug court practice when traditional due process rights are at risk.¹⁴

⁸ See, e.g., Hon. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 476–77, 531 (1999); NOLAN, *supra* note 3, at 43 (“[T]he players’ roles are altered, modified, inextricably changed. . . . Legal justice becomes therapeutic jurisprudence.” (quoting Miami, Fla., drug court Judge Jeff Rosnik)).

⁹ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1286 (1976); see also Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 377–79 (1982).

¹⁰ NOLAN, *supra* note 3, at 102–04.

¹¹ A group of a dozen drug court judges listed among the most important characteristics of a drug court judge “the ability to be empathic or to show genuine concern.” NOLAN, *supra* note 3, at 99. See also *id.* at 101 (“Judge McKinney . . . [believes drug court judges] are telling these clients ‘I care about you, and I care about some of the things that are troubling you.’”).

¹² NOLAN, *supra* note 3, at 101.

¹³ The exception is the Hon. Morris B. Hoffman, who is perhaps the most outspoken judicial critic of drug courts. See Hon. Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437 (2000) [hereinafter Hoffman, *Scandal*]; Hon. Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2085–97 (2002). Richard C. Boldt has also provided an expansive critique of certain drug court practices. See Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1256–59 (1998).

¹⁴ Boldt, *supra* note 13, at 1256–59; Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 55–56, 61–63 (2000–2001); see also Hora et al., *supra* note 8, at 522–23. Boldt’s arguments on the defendant’s due process rights are substantially repeated in Richard C.

Although their advocates often suggest they are therapeutic institutions,¹⁵ drug courts can and should be understood as advancing some of the traditional goals of the criminal justice system.

To the extent that the drug court holds itself out as a tool for policing recalcitrant drug offenders, there are a variety of perspectives that may be employed to evaluate it. Herbert Packer famously suggested that there are two models of criminal procedure: the crime-control model and the due process model.¹⁶ His models have their modern day correlates, two of which might be called the social norms model of crime control and the liberal legal models of due process.¹⁷ Packer's two models of criminal procedure may be supplemented by a third: rehabilitation or "penal welfarism" (which has its modern correlate in "therapeutic jurisprudence").¹⁸ These three models propose to account for the values that do or should underlie the criminal justice system. They offer a means by which to gauge and critique different procedural and penal initiatives. The penal-welfarist critique focuses on how effectively drug courts engage in the practice of therapeutic character transformation and how well the court procedures permit that transformation to occur. The crime-control critique traditionally evaluates the success with which drug courts channel offenders into incapacitating penal regimes and the degree to which they deter future re-offense. The due process critique evaluates the success with which the criminal justice system protects the dignity of the individual against state interference and tailors any sanction in proportion to the offense charged. Each of these models provides a standard against which to measure the practice and point of drug courts; taken

Boldt, *The Adversary System and Attorney Role in the Drug Treatment Court Movement*, in *DRUG COURTS IN THEORY AND IN PRACTICE* 115 (James L. Nolan, Jr. ed., 2002).

¹⁵ NOLAN, *supra* note 3, at 48–51.

¹⁶ See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 1–23 (1964).

¹⁷ For an account of the social norms school of legal theory, see, for example, David Cole, *Twenty-Eighth Annual Review of Criminal Procedure—Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1062 (1999) (describing social norms theorists as "new discretion" scholars); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 664–65 (1998) (describing features of social norms scholarship); Neil Duxbury, *Signalling and Social Norms*, 21 Oxford J. Leg. Stud. 719, 719–21 (2001) (reviewing ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000)).

¹⁸ For a description of penal welfarism, see GARLAND, *supra* note 2, at 27; Francis A. Allen, *The Decline of the Rehabilitative Ideal*, in *PRINCIPLED SENTENCING* 23 (Andrew von Hirsch & Andrew Ashworth eds., 1981) (describing penal welfarism in terms of the "rehabilitative ideal."). On therapeutic jurisprudence, see *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1996). See generally *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winick & David B. Wexler eds., 2003) (providing analyses and examples of the application of therapeutic jurisprudence).

together, however, they pursue criminal justice goals that conflict at different points and in different ways.

Traditionally, due process critiques of administrative objectives limit the goals of deterrence and incapacitation using principles of proportionality and individual dignity. In this way, both the length of sentence and type of carceral regime are the major subjects at issue in debates between the two perspectives as to which type of punishments to pursue. This debate is complicated further by both the particularly high rate of incarceration and the changed attitude to the rehabilitation of incarcerated offenders resulting from the "severity revolution." Many advocates of the due process model are simply opposed to the new goals of imprisonment and welcome any form of diversion, especially for victimless drug crimes. On this view, some loss of individual autonomy and institutional integrity is the price to pay for diversion from lengthy prison sentences. These due process critics resist any form of imprisonment as antithetical to core due process values. They tend to favor decriminalization as the only legitimate response to minor drug offenses.

What is wrong with the War on Drugs, however, is not imprisonment per se but excessive imprisonment. What is required in response is a liberal theory of incapacitation. Such a theory must be capable of acknowledging that, on occasion, rational agents should be punished for breaking the law. Those unable to choose rationally may deserve some form of treatment. Nonetheless, we must recognize that what constitutes treatment for one offender may constitute punishment for another. On a practical level, a liberal theory of punishment must account for the variety of public and private methods of incapacitating offenders and evaluate the relative merits of each.

Separated from the allure of diversion,¹⁹ the real question presented by drug courts is whether their version of rehabilitative interventionism is an appropriate goal for judges to pursue. Certainly, interventionism has its attractions. The social norms version of crime control and the therapeutic version of penal welfarism are both strongly interventionist.²⁰ As a method of interacting with offenders,

¹⁹ The theoretical clarity to be achieved by separating the interventionist and diversionary strains in drug courts is derived from Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2483–84 (2000).

²⁰ On the social norms version of interventionism, see, for example, Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 593 (1997) [hereinafter Meares, *Connections*] (promoting curfews, gang-loitering laws, and order-maintenance strategies). See also Tracey L. Meares, *Symposium on Race and Criminal Law: Place And Crime*, 73 CHI.-KENT L. REV. 669, 695 (1998) [hereinafter Meares, *Place*] (same); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805 (1998) [hereinafter Meares & Kahan, *Inner City*]; Dan M. Kahan & Tracey L. Meares, *Twenty-Seventh Annual Review of Criminal Procedure—Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1160–66 (1998) [Kahan & Meares, *Coming Crisis*]. For therapeutic approaches to interventionism, see, for example, Barbara A. Babb & Jeffrey A. Kuhn,

interventionism highlights the failure of courts to engage with the defendants processed through the criminal justice system. Penal welfarism's attempts to know the offender illustrate the pro forma nature of much of the criminal process under the crime-control and due process models of criminal justice procedure. If successful, drug courts stand as a glaring rebuke to business as usual in a criminal justice system that frustrates and alienates many litigants. Lawyers and litigants alike condemn the current system's formalistic rules of procedure and limited access to a remote and passive judge. Drug courts attempt to short-circuit some of these representational problems and establish the real issues out of the mouths of litigants who present their concerns directly to a sympathetic but fair judge.

Furthermore, the drug court model takes seriously the notion of treating even recalcitrant drug addicts. Under the social norms crime-control model, drug courts reflect and use community values to modify the behavior of recalcitrant drug offenders. Drug court provides an alternative set of social influences to instill norms of law-abidingness and to counter the values normally supported by addicts and their peers.²¹ This social norms approach highlights issues of recidivism and re-offense. The therapeutic penal welfarist accepts the inevitability of relapse and instead suggests measuring a drug court's success by how well it catches drug addicts in its safety net. Penal welfarism is more concerned with the quality of the therapeutic relationship established between addict and judge than reduced rates of recidivism. If drug courts are judged as a safety net diverting offenders from prison, recidivism rates are ill-fitting criteria to evaluate success. Instead, retention rates more effectively assess a court's ability to create an individually tailored, complete treatment regime that is actually utilized by addicted offenders.²²

Whereas social norms crime-control theorists are concerned with the formal and informal norms of decision that may structure rational choice,²³ rehabilitative interventionism theorists promote a more or less psychological or characterological form of treatment for drug offenders.²⁴ Both embrace a form of behavior modification normally associated with traditional conceptions of rehabilitation. They privilege certain forms of personally and socially invasive

Maryland's Family Divisions Performance Standard 5.1: A Therapeutic, Holistic, Ecological Approach to Family Law Decision Making, in JUDGING IN A THERAPEUTIC KEY, *supra* note 18, at 125; *Vision Statement for District Court of Clark County, Washington*, in JUDGING IN A THERAPEUTIC KEY, *supra* note 18, at 124 (2003).

²¹ See, e.g., Meares & Kahan, *Inner City*, *supra* note 20, at 811–16.

²² See, e.g., Hora et al., *supra* note 8, at 468 (describing drug court's focus on offender's needs).

²³ See, e.g., Lessig, *supra* note 17, at 664–71.

²⁴ See, e.g., David B. Wexler, *Relapse Prevention Planning Principles for Criminal Law Practice*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 237, 238–39 (Dennis P. Stolle et al., eds. 2000).

treatment and encourage the judge to reconstitute herself as a penal specialist or expert in informal methods of behavior modification.

An essential part of the drug court process is the increased surveillance and incapacitation of individuals who may be entitled to less onerous forms of diversion from jail. Drug courts generally require some form of incapacitation if they are to alter the social influences to which an addict is subjected.²⁵ The drug court process of incapacitation and character transformation revitalizes concerns surrounding the arbitrariness of punishment that infected prior rehabilitation schemes.²⁶ It remains far from clear that character reformation is an appropriate goal for the criminal justice system to undertake. It is even less evident that judges, who are generally untrained in the appropriate techniques of supervision and control, should be the officials dispensing this sort of invasive therapy.

Due process adherents often mistakenly conflate invasive rehabilitative practices and diversion. They assume that rehabilitation is either an unbridled good or a sufficient price to pay for diversion. On occasion, however, invasive practices significantly undermine core due process values. Of particular concern, given the drug court's structure, are aesthetic and substantive due process values. The aesthetic due process values²⁷ require "a fair and dignified legal process"²⁸ designed to "treat[] all criminal suspects with dignity and respect."²⁹ Substantive or structural due process values require the court to give flesh to the rights

²⁵ See *id.* at 145; see, e.g., Alan Feuer, *Out of Jail, Into Temptation: A Day in a Life*, in JUDGING IN A THERAPEUTIC KEY, *supra* note 18, at 18–21. Isolation from degenerate social influences is a major feature of the social norms movement. See, e.g., Meares, *Connections*, *supra* note 20, at 593 (describing the use of curfews and anti-loitering ordinances to isolate law-breakers from law-abiders); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 640–45 (1997) (discussing curfews and civil injunctions to exclude gangs from law-abiding neighborhoods).

²⁶ According to its critics, rehabilitation or penal welfarism depends upon unaccountable experts engaged in "a new style of exercising power, and a new type of social authority—that of social expertise." GARLAND, *supra* note 2, at 46. Garland describes penal-welfarist officials as "criminological experts and knowledge-professionals," utilizing "top-down mechanisms that minimize the involvement of ordinary people and spontaneous social processes, and maximize the role of professional expertise and 'government knowledge.'" *Id.* at 40, 34.

²⁷ H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1137–38 (1987).

²⁸ *Id.* at 1138; see also Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 219 (1983); *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *cited with approval* in Arenella, *supra*, at 203.

²⁹ Arenella, *supra* note 28, at 190; see also *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) ("[T]he constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.").

protected by that process. Penal welfarism, to the extent that it engages in an invasive therapeutic regime, may conflict with these due process values. In that case, liberals may be confronted with a Hobson's Choice between endorsing long periods of supervised diversion versus short periods of incarceration.³⁰

Somewhat surprisingly, where individual autonomy and dignity are at stake, these values may be better protected by short periods of incarceration than the invasive surveillance and behavior modification schemes promoted by therapeutic justice penal-welfarist and social norms crime-control models. Simply put, even on the due process model, for certain offenders, prison may be preferable to drug court.

The solution, however, is not a straightforward endorsement or rejection of all drug courts as necessarily better or worse than the possible alternatives, including incarceration. The force of that conclusion, however, depends upon the length and type of incarceration as compared with the length and type of rehabilitation provided through the drug courts.

This Article is divided into six general parts. Part II presents a general account of the drug court's practice and procedure. Part III describes the three major theories of criminal justice procedure used to evaluate the drug court's performance. Parts IV, V, and VI use those theories to critique two issues central to the drug court: treatment and diversion. Part IV explores the manner in which the penal-welfarist emphasis on treatment competes with, but does not replace, the crime-control and due process models' emphasis on individual responsibility. In the context of addiction, treatment and punishment share many of the same goals. Consequently, the rhetoric of treatment fails to conceal or justify the punitive nature of much of the rehabilitative process. The social norms version of crime control is able to endorse the invasive and penal aspects of drug courts: social norms theorists propose a highly invasive role for drug courts as part of the process of regulating social norms.³¹ The therapeutic model employed by drug courts and the judges that operate them adopts a much different view of the role of punishment in drug courts.³² In Part V, I take a close look at the manner in which drug courts match offenders to treatment to determine whether drug courts really engage in therapy or simply use treatment as a form of incapacitation or detention. In Part VI, I consider whether, and to what extent, drug courts divert

³⁰ Carceral institutions include not only prisons but mental institutions as well. See GARLAND, *supra* note 2, at 32–42.

³¹ Thus, for example, Michael Dorf and Charles Sabel propose that: "one sanction for non-compliance will be denial of secondary benefits such as housing, employment assistance, or daycare, and the ultimate sanction for repeated failure or disruption would likely be exclusion from all but medically urgent services." Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 871 (2000).

³² See, e.g., NOLAN, *supra* note 3, at 195 ("As one judge put it, 'he did not see himself as imposing punishment but providing help.'").

offenders from prison. If drug courts are moderately punitive institutions, then longer periods of diversion may be worse than shorter periods of incarceration. Part VII concludes by evaluating the success of drug courts in terms of the three models and proposes that, from a due process perspective, drug courts raise serious problems.

II. DRUG COURT PRACTICE AND PROCEDURE

In 1989, the Florida Eleventh Judicial Circuit created the first drug court by administrative order of the Hon. Gerald Weatherington, the then-Chief Justice.³³ The Miami program was set up as a diversion program, "combin[ing] treatment, including traditional treatment methods such as counseling, fellowship meetings, education, and rather non-traditional (at least then) methods like acupuncture and vocational services, with intense judicial review, including frequent reviews of urinalysis results."³⁴

The exponential growth in the numbers of drug courts is nothing short of astounding.³⁵ From the first, in Dade County, there were more than eight hundred drug courts started or in the planning and implementation stages by 2000.³⁶ All fifty states, as well as the District of Columbia, Guam, and Puerto Rico have founded drug courts.³⁷ By now, drug courts have had a significant impact upon the lives of thousands of drug offenders. The courts' therapeutic problem-solving orientation is becoming commonplace in other areas of the legal system.³⁸ Initially, however, the drug court movement developed without federal regulation or funding of the various courts.³⁹ It developed as an ad hoc movement of like-

³³ See Hora et al., *supra* note 8, at 454–55; John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 947 (2000); Hoffman, *Scandal*, *supra* note 13, at 1461.

³⁴ Hoffman, *Scandal*, *supra* note 13, at 1461.

³⁵ Goldkamp, *supra* note 33, at 948–50.

³⁶ See NOLAN, *supra* note 3, at 5.

³⁷ See *id.* at 39.

³⁸ Goldkamp, *supra* note 33, at 958–60; see also JUDGING IN A THERAPEUTIC KEY, *supra* note 18, at 73–86, 31–72 (discussing problem-solving courts generally, and specifically, juvenile drug treatment court, "teen court" (or youth court), mental health court, and reentry court).

³⁹ Goldkamp, *supra* note 33, at 948. Goldkamp notes:

The first courts were established because of the emergence of a small network of committed officials, judges, administrators, treatment providers, prosecutors, and defenders who shared their experiences and newfound expertise, who traveled to one another's courts at their own expense to observe or to provide assistance. The first courts were the product of local innovation and "elbow grease," and, as a rule, produced new initiatives with broad-based support from local justice officials and with very little, usually locally generated funding.

minded judges and practitioners, loosely affiliated by 1993 into the National Association of Drug Court Professionals (NADCP).⁴⁰

This section provides a general description of the central features shared by most drug courts. Three features are of particular importance when assessing the drug courts' mission. The first is the particularly close therapeutic relationship between the drug court judge and the offender. The second is the drug courts' role in matching offender to different types and levels of treatment, and the last is in the relatively unconstrained power of the judge to reward or sanction the drug addict.

A. *The Central Elements of Drug Court Practice*

A lack of uniform characteristics shared by all the courts complicates comprehensive analysis of drug court practice and procedure. In practice, there is no ideal or standard drug court; there are, rather, an immense number of local variations on the basic model.⁴¹

Drug courts channel offenders into treatment at a variety of different stages of the criminal justice process. There are, however, two general channeling policies: deferred prosecution and post-adjudication diversion. Deferred prosecution drug courts require that the defendant waive his right to a speedy trial and enter treatment as soon after being charged as possible.⁴² Under the post-adjudication model, the defendant is, in fact, convicted, either after trial or after a plea bargain. In that event, an incarcerative sentence is deferred pending completion of a drug treatment program.⁴³ Currently, thirty percent of drug courts divert offenders at the pretrial stage and before a plea agreement ("pretrial" and "preplea"); sixteen percent are pretrial and post-plea; twelve percent are post-conviction sentencing institutions; and the rest, forty-two percent, are some combination of the above.⁴⁴

Federal funding and general procedural standards ensure some degree of uniformity.⁴⁵ These standards, promulgated initially by the NADCP, include a

Id.

⁴⁰ NOLAN, *supra* note 3, at 39 ("By 1998 more than 2,500 drug court professionals attended the fourth annual conference of the NADCP, and in 1999 attendance . . . exceeded three thousand.").

⁴¹ For some theorists, this experimentalist orientation is the main attraction of drug courts. See Dorf & Sabel, *supra* note 31, at 841.

⁴² Murphy, *supra* note 4, at 476.

⁴³ *Id.* at 476.

⁴⁴ NOLAN, *supra* note 3, at 41.

⁴⁵ See DRUG COURT STANDARDS COMM., THE NAT'L ASS'N OF DRUG COURTS PROF'LS, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997). These standards were established in conjunction with the Department of Justice. See Quinn, *supra* note 14, at 45-46; *Drug Treatment Options for the Justice System: Hearing Before the Subcomm. on Criminal Justice,*

series of ten “key components” of the drug court⁴⁶ and a set of guidelines governing the sanctions or rewards applicable to drug court defendants.⁴⁷ These guidelines are tremendously influential. They embody the therapeutic practices of reward for compliance, limited tolerance of relapse, and graduated sanctions for non-compliance with the treatment program that are at the core of the drug court’s methodology. In addition, the American Bar Association (ABA) has published a series of drug court standards to supplement the NADCP guidelines and ensure that defendants’ procedural rights are protected.⁴⁸

Although neither set of standards is binding on any drug court unless adopted as the court’s operating procedures, Congress has conditioned federal funding upon the adoption of the NADCP standards.⁴⁹ Many state legislatures or judicial councils, in formulating their local drug court procedures, clearly respond to the NADCP and ABA standards.⁵⁰ Thus, although drug courts come in a variety of different models, in general they share certain common features.⁵¹

Based on the NADCP model standards, Judge Peggy Hora has identified five features generally attributable to drug courts.⁵² First, drug courts use eligibility criteria to identify potential participants in the drug court program.⁵³ These criteria generally require that the defendant be an addict⁵⁴ who is either a nonviolent offender or an offender who poses no security risk to the

Drug Policy, and Human Res. of the House Comm. on Gov’t Reform, 106th Cong. 2 (2000). This structure has been described as experimentalist because local organizations employ different problem-solving techniques, sharing their results through “linked systems of local and inter-local or federal pooling of information.” Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 287 (1998).

⁴⁶ DRUG COURT STANDARDS COMM., *supra* note 45, at iii–iv.

⁴⁷ *See id.* at 23–25.

⁴⁸ JUDICIAL DIVISION, AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO TRIAL COURTS: STANDARD 2.77: PROCEDURES IN DRUG TREATMENT COURTS (2001).

⁴⁹ *See Hoffman, Scandal*, *supra* note 13, at 1529.

⁵⁰ Because certain programs, such as the Oakland F.I.R.S.T. program, antedate the NADCP guidelines, they formulated their own procedural rules. Oakland, for example, formulated its rules under authority delegated by the Judicial Coordinating Committee of Alameda County. *See Brooke Bedrick & Jerome H. Skolnick, From “Treatment” to “Justice” in Oakland, California, in THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION* 43, 49–50 (W. Clinton Terry, III ed., 1999).

⁵¹ *See, e.g.*, DRUG COURT STANDARDS COMM., *supra* note 45.

⁵² Hora et al., *supra* note 8, at 453.

⁵³ *Id.* at 477–78.

⁵⁴ The issue of addiction is a complicated one, though at the heart of drug court practice. In part, these issues arise around the practice of determining who is an addict and whether addicts are the offenders channeled into drug court. In part, these issues arise around the very nature of addiction, how to properly describe addiction, whether it can be cured, and what constitutes a cure. These issues shall be addressed *infra*.

community.⁵⁵ Second, drug court procedure embodies a non-adversarial partnership among the criminal justice, correctional, and treatment systems.⁵⁶ This partnership “work[s] together to find care for defendants and to ensure that they remain in treatment.”⁵⁷ The procedure is designed to maintain the courts’ continuing jurisdiction over offenders by “delay[ing] the final disposition of cases [enabling] judges to maintain frequent ongoing contact with defendants.”⁵⁸ Third, the procedures effect a change in roles of judge, prosecutor, and defense counsel, each of whom participates as part of a treatment team.⁵⁹ Fourth, the courts require offenders to attend a designated treatment program.⁶⁰ Fifth, courts are able to accept and account for the potential of relapse by providing a range of prescribed and known sanctions for defendants who fail to comply with the program.⁶¹ Drug courts use a “system of graduated penalties . . . [, which] may include more frequent contact with the court, increased urine testing, and short periods of so-called ‘shock incarceration,’ ”⁶² to ensure compliance with their rehabilitation program.

The most striking feature of the drug court, and the feature most touted by its supporters, is its significantly reorganized court procedure premised upon therapeutic principles of justice. Accordingly, an evaluation of the drug court’s claim to have changed business as usual in the criminal justice system must start by considering its procedural innovations.

B. The Drug Courts’ Procedural Revolution

The alleged novelty of drug courts consists, first, in the judge’s role as personal, hands-on supervisor of individual defendants,⁶³ and, second, in “the

⁵⁵ See Hora et al., *supra* note 8, at 452.

⁵⁶ *Id.* at 453.

⁵⁷ William D. McColl, Comment, *Baltimore City’s Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467, 472 (1996).

⁵⁸ Boldt, *supra* note 13, at 1209.

⁵⁹ *Id.* at 1210.

⁶⁰ *Id.* at 1211.

⁶¹ *Id.* at 1212.

⁶² *Id.* at 1211.

⁶³ As one commentator put it:

These judges are not neutral fact finders; they actively direct the proceedings, track the progress of participants, and administer a system of rewards and sanctions *sua sponte*. This novel judicial role confers great institutional power—including the power to sentence offenders to periods of incarceration—to someone assuming a role traditionally played by a probation officer. While conflating these institutional roles may be efficient, it departs considerably from the traditional American conception of the judicial role.

supervised referral of identified defendants into treatment.”⁶⁴ Both innovations work to reinstate the central, active role of the judge and the team orientation found under the administrative model. This change of focus has been represented as a “fundamental paradigm shift in justice.”⁶⁵

Drug courts replace the predominantly punitive orientation of traditional approaches to crime control⁶⁶ and rehabilitation with “an approach that seeks to confront and meliorate the problems associated with persons who appear in the criminal caseload.”⁶⁷ These courts eschew the due process accusatorial or adversarial model of courtroom practice. Under that form of procedure, the judge adopts a passive role that tasks the parties with investigating facts, interrogating witnesses, and developing proposals for treatment. The drug court judge no longer relies upon treatment proposals developed by a probation officer, subject to the prosecutor’s and defense counsel’s arguments over their propriety for the particular defendant. Instead, the drug court incorporates an invasive model of criminal procedure within the courtroom with the judge at the helm. “[J]ustice and therapy are no longer separate enterprises. Instead, they are fully merged into the common endeavor of therapeutic justice.”⁶⁸

In drug court, the judge not only retains his authority to set the terms of treatment but now also assumes the role of regulating it. The court, rather than the treatment center, becomes the focal point of the treatment process. The other participants—prosecutor, defender, and defendant (or the drug court’s “client”)—are required to adopt non-traditional roles.⁶⁹ They are supposed to form, along with the judge, a treatment team dedicated to the rehabilitation of the drug-addicted defendant.⁷⁰ The team organization replaces the adversarial, adjudicative orientation of traditional courts with a therapeutic approach to drug addiction. The prosecutor and defender become partners collaborating in an effort to rehabilitate

Developments in the Law: Alternatives To Incarceration, 111 HARV. L. REV. 1863, 1918 (1998) (footnotes omitted).

⁶⁴ Boldt, *supra* note 13, at 1210.

⁶⁵ Goldkamp, *supra* note 33, at 924.

⁶⁶ See GARLAND, *supra* note 2 at 1–3.

⁶⁷ Goldkamp, *supra* note 33, at 925. See also Hora et al., *supra* note 8, at 468.

But this opportunity to intervene and break the cycle of drugs and crime requires something other than the traditional criminal justice methods that have thus far proved costly and ineffective. DTCs represent just the kind of new, therapeutically based system which is capable of addressing the root cause of drug-related crimes.

Id.

⁶⁸ NOLAN, *supra* note 3, at 37.

⁶⁹ See *id.* at 75–89.

⁷⁰ *Id.* at 75–76.

the addicted client.⁷¹ The defender must modify or mute her traditional role, “take a step back, [and] not intervene actively between the judge and the participant . . . [to] allow that relationship to develop and do its work.”⁷² Under the treatment team model, the offender’s most direct relationships are, therefore, not with his or her counsel, but with the judge and the treatment officer.

The judge’s primary role shifts from the determination of guilt to the provision of therapeutic aid. The judge’s dominant concern is to ensure the treatment and rehabilitation of the offender.⁷³ The court’s procedure emphasizes “knowledge” of the “self-as-addict” and treatment.⁷⁴ The treatment process is organized around disclosure: “the identification, assessment, and communication of emotions are central to the change process that distinguishes the drug court program.”⁷⁵ The judge “will frequently engage in a dialogue with the offender,”⁷⁶ adopting the roles of “confessor, taskmaster, cheerleader, and mentor; in turn exhorting, threatening, encouraging and congratulating the participant for his or her progress, or lack thereof.”⁷⁷

⁷¹ See, e.g., *id.* at 72–89; Pamela L. Simmons, Comment, *Solving the Nation’s Drug Problem: Drug Courts Signal a Move Toward Therapeutic Jurisprudence*, 35 GONZ. L. REV. 237, 258 (1999–2000); Hora et al., *supra* note 8, at 469 (stating that the team approach requires “cooperation and collaboration . . . ‘between communities that have been traditionally at odds and foreign to each other—treatment communities, court communities, prosecutors, defense attorneys’”).

⁷² Quinn, *supra* note 14, at 47. This description is borne out by the JUDICIAL COUNCIL, STATE OF NEW JERSEY, MANUAL FOR OPERATION OF ADULT DRUG COURTS IN NEW JERSEY (2002), available at <http://www.judiciary.state.nj.us/directive/dctman.pdf>. The manual explains that “[i]n the courtroom setting, the team should function as a collective unit, fully supporting whatever decision the team and the judge make involving a response to the participant’s behavior.” *Id.* at 29. The New Jersey treatment team, though larger than the Oakland or Brooklyn variants, includes judge, prosecutor, defender, and probation officer. *Id.* at 28–29. The manual does, however, emphasize that the defender should “perform traditional defense counsel functions with regard to the plea and sentencing processes.” *Id.* at 31.

⁷³ See NOLAN, *supra* note 3, at 141 (quoting Judge McKinney of Syracuse for the proposition that “‘the issue of guilt/innocence is not of concern’”); see also *id.* at 142 (quoting Judge Schma’s statement that “the admittance of guilt is ‘pretty much immaterial’”).

⁷⁴ *Id.* at 140 (“[T]he notion of guilt is made increasingly less relevant. . . . Guilt . . . is philosophically non-germane . . . to such a process.”).

⁷⁵ *Id.* at 112.

⁷⁶ Philip Bean, *Drug Courts, the Judge, and the Rehabilitative Ideal*, in *DRUG COURTS: A REVOLUTION IN CRIMINAL JUSTICE* 236 (1999).

⁷⁷ *Drug Treatment Options*, *supra* note 45, at 16 (testimony of Judge Jeffrey Tauber).

1. *Therapeutic Relationship Between Judge and Offender*

The central focus of the drug court is the relationship between judge and offender. Under the new, therapeutic orientation, the hallmarks of the drug court judge's role are, first, discretion in responding to the needs of her "clients"⁷⁸ and, second, establishing "a personal 'on-going, working relationship' with the offender."⁷⁹ Over the course of his or her participation in drug court, each offender engages in an intense and direct interaction with the judge directed towards "hold[ing] the defendant accountable for her actions during the course of treatment and reforc[ing] one another in actions taken to ensure that the defendant stays in treatment whenever possible and appropriate."⁸⁰

The judge "[N]o longer plays the role of neutral fact-finder, but rather 'actively direct[s] the proceedings, track[s] the progress of the participants, and administer[s] a system of rewards and sanctions sua sponte.'⁸¹ The judge therefore participates in a relationship with the offender, championing the offender's successful rehabilitation, as well as the difficulties and dangers of relapse. By entering into a relation with the offender, drug court judges suggest that they are better able to promote therapeutic goals by gaining a particular and personal knowledge of each offender. The judge's aim is to develop a flexible, individuated, responsive interaction with each offender, directed at curing the offender of his or her addiction, and in which "there are no hard and fast rules" governing how the judge does so.⁸²

The drug courts' methodology marks a dual attack on old-style criminal justice. Its strong emphasis on interventionist styles of interaction and authority reject the propriety of due process restrictions on the courts' therapeutic models. Drug courts also, however, dismiss the supposedly soft approach of prior rehabilitative regimes. They seek to bolster the safety net model of rehabilitation with tough love. Drug courts treat the addicted offender as in need of the shock and structure provided by sanctions, so long as those sanctions are consistently applied and so graduated as to recognize the role relapse plays in the therapeutic process. Rehabilitation in the drug court is not a process of "referring, re-referring, and re-re-referring" recalcitrant offenders to treatment regimes in hope

⁷⁸ See Hora et al., *supra* note 8, at 469 ("The drug offender becomes a client of the court, and judge, prosecutor, and defense counsel must shed their traditional roles and take on roles that will facilitate an offender's recovery from the disease of addiction."); see also NOLAN, *supra* note 3, at 112.

⁷⁹ Simmons, *supra* note 71, at 259.

⁸⁰ Hora et al., *supra* note 8, at 472.

⁸¹ Simmons, *supra* note 71, at 259.

⁸² NOLAN, *supra* note 3, at 105. See generally *id.* at 100-06.

of effecting a cure.⁸³ Rather, drug courts envisage the consistent application of sanctions as part of the therapeutic process, one that imposes structure on the addicts' lives.

2. *Provision of Treatment to Offenders*

Generally, the court mandates supervision of drug offenders for one year and spreads treatment over a variety of phases, from intake, to counseling and drug education, to aftercare and transition issues.⁸⁴ Each phase employs progressively less intensive supervision of the offender.⁸⁵ The first phases are generally highly intensive and can require as much as four days per week of group and individual counseling and education or attendance at treatment providers as well as regular, often weekly, court appearances.⁸⁶ Frequent urine testing is generally required throughout the program.

Matching offenders to particular treatment providers is central to the court's mission. In determining what treatment is appropriate, the drug court judge generally has a range of available treatment options from which to choose. Most require visits with a probation officer and a drug education component, along with the mandatory urine tests. In addition, some form of group or individual counseling is required.

Of the programs offered by treatment providers, the least restrictive are the self-help programs modeled upon Alcoholics Anonymous or its drug counterpart, Narcotics Anonymous.

These programs are designed to promote themes of acceptance, moral responsibility and spiritual growth through a process of achieving twelve steps. In the first three steps, the abuser recognizes powerlessness over the substance and develops a commitment to a higher spiritual power. In steps four through nine, the abuser deals with character defects and guilt and begins to develop ways to rebuild self-esteem and relationships. The last three steps involve a renewed commitment to past steps and spreading the message to others.⁸⁷

Outpatient drug-free treatment programs also employ some form of "informal peer discussions, twelve-step meetings, recovery training or self-help and relapse

⁸³ Sam Torres, *Should Corrections Treat or Punish Substance-Abusing Criminals?*, FED. PROBATION, Sept. 1996, at 18, 20.

⁸⁴ Hora et al., *supra* note 8, at 475.

⁸⁵ *See id.*

⁸⁶ James R. Brown, Note, *Drug Diversion Courts: Are They Needed And Will They Succeed In Breaking The Cycle Of Drug-Related Crime?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 90-91 (1997).

⁸⁷ William G. Meyer & Jack Lutes, *Sentencing the Drug Offender*, 21 COLO. LAW. 657, 662 (1992).

prevention strategies.”⁸⁸ The proportion of drug offenders in such programs is relatively high: “Almost 50 percent of all persons in drug treatment are involved in this type of clinical program. The type of treatment available varies widely. The treatment emphasizes counseling instead of medication but may consist of loosely structured ‘rap’ groups or very structured clinical approaches.”⁸⁹ Inpatient treatment programs, which generally last from three to four weeks,⁹⁰ utilize similar approaches in a hospital setting.⁹¹ Residential treatment is a more intensive therapeutic modality. It usually lasts from three to six months and “focus[es] the addict on eliminating drug usage, reestablishing family ties and providing the addict with basic survival skills.”⁹²

The most restrictive and longest lasting treatment program is the therapeutic community. Communities such as Synanon, Daytop, and The Phoenix House, are “known for their hands-on, confrontational approach to addictive behavior.”⁹³ In the therapeutic community, the goal is to force the offender to confront his or her addiction and “change personality traits and behavior,”⁹⁴ and “[t]reatment is conceptualized as a process of emotional maturation achieved through heightened self-awareness and self-discipline. In this process, the community serves as the primary therapeutic agent, challenging the resident to accept responsibility through forced self-reflection and acceptance of menial chores.”⁹⁵ Such programs are of long duration, often lasting from six to twenty-four months, and some form of aftercare may be mandatory.⁹⁶ Drug courts may use each of these treatment options depending upon their availability and the addict’s progress through the treatment process.

3. *Expressing Empathy Using Praise and Sanction*

The central feature of drug court is its novel style of courtroom practice. The NADCP standards empower the judge to reward compliance with the program by

⁸⁸ Lisa Rosenblum, Note, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1227 (2002).

⁸⁹ Meyer & Lutes, *supra* note 87, at 662.

⁹⁰ *Id.*

⁹¹ See Rosenblum, *supra* note 88, at 1227–28; Hon. Stephen C. Cooper, *The Carrot and the Stick: How Effective Sanctions and Incentives Succeed in Overcoming Addiction*, MICH. B.J., Jan. 2003, at 20, 24; Meyer & Lutes, *supra* note 87, at 662.

⁹² Meyer & Lutes, *supra* note 87, at 662.

⁹³ Timothy Edwards, *The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System: The Wisconsin Experiment*, 2000 WIS. L. REV. 283, 318.

⁹⁴ Meyer & Lutes, *supra* note 87, at 662.

⁹⁵ Edwards, *supra* note 93, at 319.

⁹⁶ Meyer & Lutes, *supra* note 87, at 662; see also Rosenblum, *supra* note 88, at 1226–27.

providing “[e]ncouragement and praise from the bench; [and c]eremonies and tokens of progress,”⁹⁷ and to respond to or sanction noncompliance by issuing “[w]arnings and admonishment from the bench in open court . . . [or] [c]onfinement in the courtroom or jury box.”⁹⁸ The goal, which is embedded in the structure of the treatment model most drug courts employ, is to encourage the offender to realize that the program is designed for his or her own benefit, so that he or she eventually comes to identify with the judge and the drug court system, expressing “appreciat[ion] [for] the help and care offered.”⁹⁹

There are at least two ways in which to understand the distinctive courtroom practice employed by drug court judges. One version (which, as we shall see, is compatible with the penal-welfarist model) regards drug court offenders as, at the very least, incipient addicts who have a non-voluntary and irrational craving for their drug of choice.¹⁰⁰ This is the disease model of addiction favored by many judicial proponents of therapeutic justice.¹⁰¹ Treatment, on the disease model, consists in isolating the addict from the drug she craves and modifying her behavior by a process of training such that she internalizes non-addictive norms.¹⁰² Social norms theory suggests a different understanding of addiction. It is compatible with treating drug offenders as—at least moderately—rational and so susceptible to formal and informal pressure to accept norms promoting law-

⁹⁷ DRUG COURT STANDARDS COMM., *supra* note 45, at 24.

⁹⁸ *Id.* at 24.

⁹⁹ Bean, *supra* note 76, at 241.

¹⁰⁰ Hora et al., *supra* note 8, at 464–68.

¹⁰¹ The disease model of addiction claims that addiction is a biological or psychological propensity to crave drugs. *See, e.g., id.* In contrast, other theorists explain addiction by primarily environmental or social factors. *See, e.g.,* Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413 (1974-1975) [hereinafter Fingarette, *Addiction*]; Herbert Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the “Disease Concept of Alcoholism”*, 83 HARV. L. REV. 793 (1969-1970) [hereinafter Fingarette, *Perils*]. For a graphical description of the difference between the disease model and environmental model, see STANTON PEELE & CHARLES BUFE, *RESISTING 12-STEP COERCION: HOW TO FIGHT FORCED PARTICIPATION IN AA, NA, OR 12-STEP TREATMENT* 133 (2000). Two of the most prominent advocates of therapeutic jurisprudence have contested the link between the disease model and therapeutic jurisprudence. *See* Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, in *JUDGING IN A THERAPEUTIC KEY*, *supra* note 18, at 108–09. Nonetheless, many judges associate drug courts, and the therapeutic model espoused therein, with the 12-step model of addiction. In addition to Judge Hora, for example, Judge Lawrence Terry of the Santa Clara drug court “tells people [that] . . . he’s going to push them, shove them, box them by using the threat of incarceration to get them to start down the path of 12-step recovery.” Shannon Lafferty, *Terry Emphasizes Counseling in San Jose*, in *JUDGING IN A THERAPEUTIC KEY*, *supra* note 18, at 26.

¹⁰² *See, e.g.,* Cooper, *supra* note 91, at 23 (emphasizing role of training in treating offenders).

abiding behavior.¹⁰³ The rational choice model favored by social norms theorists is, as we shall see, compatible with the crime-control model.

Under the therapeutic justice version of drug court procedure, rewards and sanctions are part and parcel of a training process in which the offender is to be weaned off his or her anti-social behavior.¹⁰⁴ Any opportunity to reward positive behavior may be utilized: one judge awards drug “[t]est subjects who had a negative test result . . . the opportunity to draw from a fish bowl for prizes, which ranged from nothing at all to nominal prizes (a dollar, a pencil, etc.) up to a TV.”¹⁰⁵ The policy behind such rewards can be quite explicit. As the judge explains:

Anyone who has tried to train a pet knows how important [are immediate, consistent, and certain consequences for both negative and positive behavior]. If your pet messes up when you are not at home and the sanction comes hours later when you get home, the pet doesn’t connect the punishment with the behavior but rather with you and your coming home. If the pet obeys a command, but your praise is not automatic, that reinforcement is lost. . . . This truth has recently been confirmed by scientists studying human brains. All rewards, even verbal praise, seem to register as part of the dopamine reward system within the brain.¹⁰⁶

Training takes a variety of forms. In some courts, the judge delivers motivational talks and encourages offenders to testify about their life experiences, with each offender’s contribution receiving, as reinforcement, a round of applause. Graduation ceremonies are a common reward for the offenders who have successfully completed a stage of the rehabilitation process.¹⁰⁷ In the course

¹⁰³ See, e.g., Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 633 & n.39 (2001) (reviewing POSNER, *supra* note 17) (suggesting, as part of a rational choice model of action, that actors with “bad” social norms are likely to be obese or addicted (citing POSNER, *supra* note 17, at 21)). Tracey Meares provides an extended discussion of the relation between social norms, drug possession, and drug trafficking. See Meares, *Place*, *supra* note 20, at 684–94. For a slightly different take on the relation between social norms and crimes premised upon addiction, such as alcoholism and drug crime, see William J. Stuntz, Essay, *Race, Class, And Drugs*, 98 COLUM. L. REV. 1795 (1998).

¹⁰⁴ See, e.g., Simmons, *supra* note 71; NOLAN, *supra* note 3, at 37; Hora et al., *supra* note 8, at 442–54; McColl, *supra* note 57, at 468–70.

¹⁰⁵ Cooper, *supra* note 91, at 23.

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., NOLAN, *supra* note 3, at 102; Claire McCaskill, *Combat Drug Court: An Innovative Approach to Dealing with Drug Abusing First Time Offenders*, 66 UMKC L. REV. 493, 498 (1998) (noting that purpose of ceremony is to recognize each drug addict for their success).

of such ceremonies, each of the graduates receives a token of success, such as a certificate, a T-shirt, and, with some judges, a hug.¹⁰⁸

Sanctions are also part of the therapeutic process. They vary from the quite traditional to the exotic.¹⁰⁹ Although most courts publish guidelines setting forth the range of applicable sanctions,¹¹⁰ some do not.¹¹¹ The more traditional sanctions "include: (1) a verbal warning from the judge; (2) demotion to a previous stage; (3) incarceration for a period of days or weeks depending on the program number and severity of the violation; and (4) an increase in status hearings, treatment sessions, or urine tests."¹¹² Prolonged relapse results in termination from participation in the program. The terminated offender returns to the court system or is imprisoned depending on whether the drug court is a pre- or post-sentencing program. Depending on the court, short spells of imprisonment may be used to punish relapse at an early stage of the process or as a last resort.¹¹³ In some programs, many, if not most, of the offenders will spend a short period of time in prison due to some sort of violation.¹¹⁴

Alternatively, the judge can impose sanctions that are more "expressive,"¹¹⁵ more in the manner of "shaming" sanctions.¹¹⁶ One of the more usual early

¹⁰⁸ NOLAN, *supra* note 3, at 102. In the Hampden County Juvenile Drug Court, located in Springfield, Massachusetts, for example, success is celebrated by giving offenders Burger King vouchers. Conversation with court officer, Hampden County Juvenile Drug Court, in Springfield, Mass. (Oct. 6, 2004).

¹⁰⁹ Two of the major proponents of therapeutic jurisprudence clearly worry about the nature of some drug court sanctioning programs, admonishing that the due process limits articulated in *In re Gault* must be respected. See Introduction, in JUDGING IN A THERAPEUTIC KEY, *supra* note 20, at 3-4.

¹¹⁰ For example, "Florida's Broward County drug court has specific guidelines for increased sanctions for clients failing urine analysis." See Brown, *supra* note 86, at 91 n.280 (citing Ronnie Green, *Drug Court Audit Praises 'Favorable Results,' But Pans Judge*, THE HERALD, Feb. 18, 1995, at 1BR).

¹¹¹ See, e.g., Cooper, *supra* note 91, at 23.

¹¹² Lynne M. Brennan, Comment, *Drug Courts: A New Beginning for Non-Violent Drug Addicted Offenders—An End to Cruel and Unusual Punishment*, 22 HAMLINE L. REV. 355, 380 (1998); see also Brown, *supra* note 86, at 91.

¹¹³ Compare the Broward County, Florida program where the judge may impose weekend incarceration on offenders who fail two tests and dismiss offenders who return ten failed tests, Brown, *supra* note 86, at 91 n.280 (citing Green, *supra* note 110, at 1BR) with Dorf and Sabel's claim that "[d]rug courts, for their part, recognizing both the special nature of prison, and its continuity with other sanctions, use it very sparingly." Dorf & Sabel, *supra* note 31, at 870.

¹¹⁴ See, e.g., Brown, *supra* note 86, at 91 n.283 ("In Miami's drug court, as many as 60% of the clients spend a short time in jail for failing to adhere consistently to their treatment plan.") (citing PETER FINN & ANDREA K. NEWLYN, U.S. DEP'T OF JUSTICE, DADE COUNTY DIVERTS DRUG DEFENDANTS TO COURT RUN REHABILITATION PROGRAM 10 (1993)).

¹¹⁵ See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 611 (1996). Kahan is one of the major social norms theorists.

sanctions is an increase in frequency of court appearances. Appearances that are more frequent enable the judge to admonish the offender and empathize with the consequences of future relapse. Another shaming sanction requires offenders to spend the hearing sitting in the jury box. The jury box becomes a sort of rogues gallery or penalty box for relapsing offenders. From there, they are exposed to others who have successfully modified their behavior as a result of the treatment program.¹¹⁷ The NADCP standards explicitly recommend this simple way of modeling good behavior.¹¹⁸

Again, the purpose of expressive sanctions may be understood from a social norms or therapeutic jurisprudence perspective. From the point of view of rational choice theory, expressive sanctions help communicate the "social meaning" of the offense.¹¹⁹ They provide an alternative community response to drug addiction, one that both models law-abiding behavior and condemns law-breaking by providing a community of drug court peers to support or sanction the relevant conduct.¹²⁰

From a therapeutic perspective, these sanctions are part of the process of training and behavior modification. They communicate to the offender the court's attitude to his or her progress.¹²¹ The different punishments are often justified

¹¹⁶ See Brown, *supra* note 86, at 92 ("In some courts, clients make weekly appearances before the judge, along with treatment and probation officials, to report on the client's status and progress."). For example, one judge conducts random urinalysis tests in the court itself, requiring the director of the treatment program to test samples before the bench. This sanction is so effective that "[s]ome of [the offenders] who haven't used [drugs] get so scared they might be willing to say they use, just to not put them through the anxiety of going through the test." NOLAN, *supra* note 3, at 75.

¹¹⁷ See Brown, *supra* note 86, at 92.

¹¹⁸ DRUG COURT STANDARDS COMM., *supra* note 45, at iii-iv.

¹¹⁹ See, e.g., Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 615-17 (1998); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 380-83 (1999).

¹²⁰ For the importance of peer support to social norms theories, see, for example, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997).

¹²¹ For example, Hon. Stephen C. Cooper suggests that:

REALITY IS IN THE EYES OF THE BEHAVER.

....

...[S]ome defendants [do not] mind jail or work release—it gets them away from unpleasant family situations and provides meals and a bed. Others look upon having been in jail as a badge of honor and report to their friends how they survived. Some see jail as easier to do than fines, therapy, daily testing, or other intrusive requirements. . . .

. . . The same sanction may have no real effect on a wealthy person who can easily pay, or a poor person who would be frustrated by having no chance whatsoever of paying.

because imposed “therapeutically” rather than punitively. They are “a weapon to keep clients on the road to success.”¹²²

Short terms of incarceration have been called “shock therapy,” “motivational jail,” and “my motel.” The imposition of a “sanction” is not a form of punishment but a parent-like response. “[Incarceration] is not really punishment at all, but a therapeutic response to the realistic behavior of drug offenders in the grip of addiction” and sanctions are really just the “restructuring of the defendant’s lifestyle.”¹²³

The drug court’s courtroom practice is expressly modeled upon therapeutic principles. The court’s informal, invasive structure permits the judge great leeway to “know” offenders by appreciating “the personalities and backgrounds of [the] offenders” and gaining “the fullest information possible concerning the defendant’s life and characteristics.”¹²⁴ The judge has tremendous discretion to use that knowledge to restructure the offender’s life and social relations.¹²⁵ As an empathetic expert, the judge is expected to tailor the system of rewards and punishments to best suit the individual offender’s treatment needs.¹²⁶ The other experts on the treatment team, including rehabilitative experts and treatment providers, supply additional information. Offenders participate by accepting the normative values imposed by the court or the treatment provider and modifying their behavior accordingly. This offender-oriented practice is a distinctive feature of the therapeutic style of practice.¹²⁷

The therapeutic imperative underlying much of what the drug court does is expressly premised upon a rejection of the traditional prescription to treat like cases alike and of other due process protections that stand in the way of the relationship between judge and client.¹²⁸ Instead, court practitioners promote an ad hoc, case-by-case client-centered model of judging.

Cooper, *supra* note 91, at 23.

¹²² Brown, *supra* note 86, at 91.

¹²³ Hora et al., *supra* note 8, at 470, 523.

¹²⁴ Williams v. New York, 337 U.S. 241, 246, 247 (1949).

¹²⁵ Here the penal-welfarist model provides a useful guide to further research. The issue is to determine whether this is truly penal welfarism or some system of court practice more bounded by due process restraints. Studies could be conducted of individual courts or by comparing courts to establish the ways in which the judge uses his or her discretion to punish and/or reward offenders and the extent to which his or her discretion is bounded by specific court rules or policies.

¹²⁶ Some court-by-court study of the training provided to individual judges would help establish how seriously the drug court takes this treatment role.

¹²⁷ See GARLAND, *supra* note 2, at 137 (contrasting offender-oriented penal welfarism with victim-oriented severity).

¹²⁸ See JUDGING IN A THERAPEUTIC KEY, *supra* note 18, at 129–55.

The judge may cite the results of the latest drug test, showing that he or she is pleased or disappointed with the results of the offender's progress, but there is no attempt to determine the validity of the tests, or allow defense lawyers to put any plea [in] mitigation. The offender's family may corroborate or discount the offender's story, again with little or no apparent concern for evidential or procedural rules. In some courts the offender's "significant other" . . . may participate in the program, again with no apparent regard for the rules of evidence or other procedural matters, including matters of jurisdiction where "significant others" become subject to the same sanctions as the offenders.¹²⁹

In drug court, partiality thus becomes an important aspect of the judge's commitment to the therapeutic ideal. "The goal of getting the drug court client well . . . now supersedes the goal of consistency and impartiality,"¹³⁰ and so the judge is no longer an aloof dispenser of justice but rather the offender-client's stern but steadfast friend, someone "on the same level" as the defendant.¹³¹ It is the judge who is now the client's advocate, empowered on the basis of his or her relationship with the individual offenders to embrace and cry with them—literally¹³²—when they celebrate their success and punish the offender's failures as a passionate, engaged, heroic advocate for their client's health.

The judicial role is that of the therapeutic expert empowered to determine the best interests of the offender. The drug court's therapeutic paradigm requires the judge to discount the offenders' accounts of their goals for or responses to treatment unless they fit a fairly rigid script. Offenders are required to get with the program, both as a therapeutic imperative and on pain of punishment. Failure to do so results in the imposition of sanctions that are often justified as the sort of short, sharp shock necessary to alert addicts to the consequences of continued relapse.¹³³

The rhetoric of treatment and therapy is thus used to impose periods of detention inside and outside of prison. Some forms of detention emphasize behavior or character modification. Others simply incapacitate. Some do so in prison, others in the courtroom or private facilities. The underlying justification for such sanctions is that they are not punishment but therapeutic treatment and training. They are not penal decisions, requiring due process procedure to protect

¹²⁹ Bean, *supra* note 76, at 237.

¹³⁰ *Id.* at 104.

¹³¹ See NOLAN, *supra* note 3, at 101. Drug court advocates do not discuss the contradiction inherent in the roles of equal and superior. It is here that the comparison with juvenile courts and the rejection of *parens patriae* has most bite. At least one judge has expressed the relationship between judge and defendant in terms of "parenting." *Id.* at 103.

¹³² See *id.* at 102.

¹³³ See *id.* at 196.

the offender's rights.¹³⁴ Rather, they are justified as treatment decisions made by the judge as rehabilitation expert.¹³⁵ The availability of treatment to occupy the field of penal justifications in this context is the subject of the next two sections.

III. THREE MODELS OF CRIMINAL JUSTICE PRACTICE AND PROCEDURE

In this section, I propose to provide three models against which to evaluate the drug court's claim to provide a "revolutionary,"¹³⁶ "innovative"¹³⁷ approach to court-dispensed justice. The attractiveness (and necessity) of the drug courts' procedural, managerial, and therapeutic imperatives helps explain these courts' exponential rise since they first appeared in 1989.¹³⁸ Drug courts are appealing, I claim, precisely because they accommodate traditional criminal justice values expressed through the administrative, due process, and penal welfare descriptions of crime control. By representing these traditional values in a modern guise, drug courts can appear as all things to all people, while acting upon a much more limited range of penal goals.

¹³⁴ See, e.g., *Sandin v. Conner*, 515 U.S. 472, 484 (1995) (holding that a decision to impose more punitive sanction requires due process hearing); *Morrissey v. Brewer*, 408 U.S. 471, 486-487 (1972) (requiring due process hearing prior to revoking probation).

¹³⁵ See, e.g., *Washington v. Harper*, 494 U.S. 210, 231 (1990) (finding an inmate's interests "adequately protected" where treatment decision is made "by medical professionals rather than a judge").

¹³⁶ See *Hora et al.*, *supra* note 8 at 439; *NOLAN*, *supra* note 3, at 39, 216 n.3; *HON. JEFFREY TAUBER*, *Preface*, in *DRUG COURTS*, *supra* note 76.

¹³⁷ The idea that the drug court is an innovative form of justice is repeated like a mantra by its supporters. See *Goldkamp*, *supra* note 33, at 936, 937, 939 (referring to "the drug court innovation"); *JOHN S. GOLDKAMP*, *NATIONAL INST. OF JUSTICE, JUSTICE AND TREATMENT INNOVATION: THE DRUG COURT MOVEMENT* (1993); *John Feinblatt et al.*, *Institutionalizing Innovation: The New York Drug Court Story*, 28 *FORDHAM URB. L.J.* 277, 291 (2000) (identifying drug courts as a "new policy innovation"); *McCaskill*, *supra* note 107, at 493; *Brown*, *supra* note 86, at 64 ("One exciting and innovative approach to addressing drug-related crime has been the establishment of 'drug diversion courts.'"); *Hon. William D. Hunter*, *Feature*, *Drug Treatment Courts: An Innovative Approach to the Drug Problem in Louisiana*, 44 *LA. B.J.* 418, 418 (1997); *Dorf & Sabel*, *supra* note 31, at 843.

¹³⁸ The Florida Court of Appeals has noted that:

There are currently drug courts in forty-eight of our fifty states, and in England, Canada, Australia, South America, Bermuda, and the Caribbean. There are currently seventy-four drug courts (thirty-eight adult, twenty-two juvenile, twelve dependency, and two re-entry) in the State of Florida.

Smith v. State, 840 So. 2d 404, 407-08 (Fla. Dist. Ct. App. 2003).

A. The Three Models: Crime Control, Due Process, and Penal Welfarist

The drug court can be understood from a number of different perspectives: for present purposes the two most important are as a model for court practice or as a law-enforcement institution. Traditionally, courts occupy a neutral role in the criminal justice system.¹³⁹ The adversarial courtroom proceedings generally empowered the adjudicative function of the court.¹⁴⁰ The court's role in the criminal justice system, in the traditional model, is as neutral arbiter of the competing interests in the criminal justice system.¹⁴¹ Accordingly, some of the main issues facing those concerned with the role of courts in the criminal justice system have been at what point to invoke the power of the court, how much power to give the court, and how much discretion to give the court to effect whatever power it enjoys.

Herbert Packer famously articulated two sets of values by which to assess and critique the actual practices and procedures employed within the criminal justice system at any given time.¹⁴² Each provides a different set of goals or priorities by which to determine what should be the role of the government in apprehending and prosecuting offenders, what should be the offender's rights and duties once apprehended, and when and how the court should oversee the process of detention, apprehension, and sentencing. Each therefore promotes a discrete procedural style in processing the offender through the criminal justice system.

¹³⁹ See Chayes, *supra* note 9, at 1286.

[T]he traditional conception of adjudication carried with it a set of strong notions about the role of the trial judge. In general he was passive. He was to decide only those issues identified by the parties, in accordance with the rules established by the appellate courts, or, infrequently, the legislature.

Id. See also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 376 (1982) (stating the "classical view of the judicial role . . . [in which] judges are not supposed to have an involvement or interest in the controversies they adjudicate.").

¹⁴⁰ See Chayes, *supra* note 9 at, 1282–84 (suggesting that adversarial posture is important for neutral, passive, adjudicative role of judge).

¹⁴¹ See, e.g., *Johnson v. United States*, 333 U.S. 10, 14 (1948) (holding that the Fourth Amendment requires due process to be assessed by "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime").

¹⁴² See Packer, *supra* note 16. These models have been resurrected by Peter Arenella, see Arenella, *supra* note 18, and most recently by Professor Ogletree. CHARLES J. OGLETREE, JR., *The Rehnquist Revolution in Criminal Procedure*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* (H. Schwartz, ed., 2002). See also Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM. 591, 592 (1990). However, the distinction is now a matter of hornbook analysis. See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* § 2.01[B], at 22–25 (2d ed. 1997).

The crime-control model is organized around the principle of repression of crime and affords the executive branch wide discretion in pursuing and prosecuting criminals.¹⁴³ It limits or delays the use of formal procedural checks enforced through neutral judicial scrutiny.¹⁴⁴ The crime-control model's primary goal is to empower the executive branch in combating crime; accordingly, it "exhibits significant confidence in the government's identification of suspects as guilty of the crime with which they are charged."¹⁴⁵

An influential and purportedly liberal, modern version of the crime-control model has variously been described as legal pragmatism,¹⁴⁶ "norm focused scholarship," the "New Chicago School,"¹⁴⁷ and the "new discretion scholars."¹⁴⁸ These scholars suggest, first, that social norms are a more important factor in explaining compliance with the law than legal sanctions and, second, that the law

¹⁴³ This discretion includes the use of deceptive or borderline violent practices to ensure the waiver of rights before the accusatorial process begins. See Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 873–74 (1995) (describing deceptive and intimidating practices used in modern criminal interrogations). The use of deception has been justified using an approach reminiscent of the crime-control model. See William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 785 (1989) (characterizing defendant's Fourth-Amendment rights as protection against police misconduct). On Stuntz's account, rights ought to be available only to the factually innocent, rather than every criminal accused.

¹⁴⁴ For example, the requirement that a neutral magistrate issue a warrant (the so called "warrant requirement.") See, e.g., *Johnson*, 333 U.S. at 14. Packer calls these forms of judicial oversight "ceremonious rituals." Packer, *supra* note 116, at 10.

¹⁴⁵ OGLETREE, *supra* note 142, at 56; Arenella, *supra* note 28, at 224 ("[C]rime control ideology suggests that criminal procedure should function exclusively to punish the guilty. It values fair process norms primarily for their instrumental tendency to promote good 'results'").

¹⁴⁶ William H. Simon, *Solving Problems v. Claiming Rights: The Pragmatist Challenge to Liberal Legalism* 48–74 (August 1, 2003) (unpublished manuscript, on file with author) (describing social norms theorists as legal pragmatists).

¹⁴⁷ Bernard E. Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 L. & SOC'Y REV. 179, 179 (2000).

¹⁴⁸ Cole, *supra* note 17, at 1062. Cole emphasizes discretion both because it is a common response by the various scholars under discussion, though particularly the Chicago and Columbia schools. His response is to control discretion through clear, mandatory norms. He thus participates in a tradition of what might be called legalism scholars that would include LaFave, Amsterdam, and Davis. Because I suggest that the newness of the new discretion is its focus on community standards of behavior—social norms—and am sympathetic to, but dubious of, the efficacy of legalistic responses as the only solution to the issues he identifies, I prefer to emphasize the social and normative aspects of the scholarship.

is most likely to be obeyed when legal norms reflect social norms.¹⁴⁹ Where social and criminal law norms are strongly correlated, persons are highly likely to obey the law voluntarily; where the social and criminal norms are poorly correlated, or where social norms are fragmented, compliance with the law is minimal or random.¹⁵⁰

Norms scholars also seek to shift our assessment of the criminal law's impact away from persons, particularly criminals, and onto communities generally described by some relatively small locality, for example, "the neighborhood." Normative scholarship on law-enforcement can best be understood in terms of its oppositions to an older tradition of liberal legalism: social norms scholars focus on insiders rather than outsiders, law-abiders rather than law breakers, public order issues rather than major crimes, local experimentation rather than centralized standards. They tend to emphasize discretion rather than legalism and rule-of-law issues and to favor race-neutral rather than race-based explanations of current policing practices.¹⁵¹ The emphasis of the social norms is to empower police by rejecting broad, court-enforced standards of policing or checks on prosecutorial discretion in favor of highly discretionary forms of policing designed to reflect a sensitivity to social norms.¹⁵²

The governing principle of the due process model the protection of individual liberty from governmental interference or invasion. The individual's rights are respected and expressed through an adversarial type of procedure in which the power of the court is invoked early and often. Due process constrains executive discretion to surveil, detain, and search suspects. Formal judicial oversight begins at the pre-trial process and extends throughout the criminal justice process.¹⁵³ Guilt must be established formally, through legal adjudicative processes, rather than assumed or established informally.¹⁵⁴ Defendants are afforded significant rights and protections, including rights against self-incrimination and the right to

¹⁴⁹ See, e.g., Eric A. Posner, *Symposium: The Legal Construction of Norms: Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781 (2000) (examining the norms and behaviors surrounding tax compliance).

¹⁵⁰ Meares, *Connections*, *supra* note 20, at 582.

¹⁵¹ For a general discussion of social norms theories, see Simon, *supra* note 146, at 21–26; 47–71.

¹⁵² See, e.g., Livingston, *supra* note 25; Meares & Kahan, *Inner City*, *supra* note 20; Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

¹⁵³ Arenella suggests that the due process model constrains executive power by diffusing through different officials and "allocates considerable power to the judiciary and the community to review the executive's decisions." Arenella, *supra* note 28, at 223.

¹⁵⁴ See *id.* at 214 (critiquing Packer's distinction between factual and legal guilt, and suggesting that guilt is to some extent always established normatively).

counsel. The presumption of innocence and the burden of proof establish core limits on governmental power.¹⁵⁵

Liberal legalism has attempted to revitalize the due process model, most recently in contrast to the social norms version of crime control.¹⁵⁶ Many of the liberal legal scholars attempt to impose substantive limits on police power by requiring transparency and accountability in the enforcement process. More generally, liberal legalism scholars emphasize the important role that clear norms of executive conduct play in limiting the power of the police during the investigatory process.¹⁵⁷

Another way in which to distinguish social norms theories from legal liberalism are their distinctive grounds for imposing punishment. Social norms theories emphasize that “the individual who complies for normative reasons does so because she feels an internal obligation to do so,” rather than on the basis of some external stimulus.¹⁵⁸ In the legal context, legitimate authority is particularly

¹⁵⁵ See OGLETREE, *supra* note 142; see also *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377 U.S. 201 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁵⁶ See, e.g., Albert Alschuler and Stephen Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, U. CHI. LEGAL F. 215, 239–42 (1998).

¹⁵⁷ See, e.g., Anthony G. Amsterdam, *Perspectives On the Fourth Amendment*, 58 MINN. L. REV. 349 (1973–74); Cole, *supra* note 17; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).

¹⁵⁸ Tracey L. Meares, *A Colloquium on Community Policing: Praying for Community Policing*, 90 CAL. L. REV. 1593, 1616 (2002) [hereinafter Meares, *Praying*]; see also Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 214 (1998) [hereinafter Meares, *Social Organization*] (noting that compliance with norms can be based on agent’s internal perception of government legitimacy). The manner in which Meares distinguishes legitimate from justified authority is substantially identical to the analytic description. The concepts of legitimacy and justification are normative; they entail a particular, internal attitude on the part of the law’s subjects. See, e.g., Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. ILL. L. REV. 851, 864–65 (2002); Meares, *Place*, *supra* note 20, at 670–80. The sociological model relies on a psychology-based “theory of procedural justice that does account for the regular conference in legitimacy in the face of repeated negative outcomes.” Tracey L. Meares, *Symposium: New and Critical Approaches to Law and Economics (Part II) Norms Theory: Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 402 (2000) [hereinafter Meares, *Norms*]. Meares, one of the more prominent scholars of normative criminal law, has indicated a distrust of philosophical categories of legitimation and justification. She contrasts the “very distinct and crisp models of legitimacy” with “philosophical notions of what is ‘right’ and ‘just,’” and seems to suggest that the essential difference is that the sociological models “can be empirically tested and so are more useful to the policymaking enterprise.” *Id.* The psychological account, however, is strongly reminiscent of the philosophical account provided so far; it stresses the internal aspect of legitimacy and justification as contrasted with an externalist focus on outcomes alone. See, e.g., *id.* at 399; Tracey L. Meares, *Signaling, Legitimacy, and*

associated with the type of authority exercised by government and consists in “an amalgamation of perceptions that individuals hold of the law and authorities that enforce it.”¹⁵⁹ The greater the popular perception of governmental legitimacy, the greater the likelihood of popular compliance with the law.¹⁶⁰

Social norms theories claim to guarantee governmental legitimacy, despite invasive police, prosecutorial, and sentencing practices, through executive responsiveness to local concerns: they propose a variety of programs for including local communities in the process of creating and enforcing executive norms.¹⁶¹ Accordingly, community or neighborhood participation in enacting or executing invasive policing and sentencing practices is sufficient to justify the resulting crime-control regime.¹⁶²

What I shall call a retributive or moral liberalism version of legal liberalism asserts a moral basis for punishment: punishment is part of a social conversation that attempts to determine how one is to participate in society and interact with others as a moral being.¹⁶³ What I shall call, following Jean Hampton, neutral liberalism asserts that punishments must be those identified by some morally neutral process that “eschews commitment to any particular moral or religious code.”¹⁶⁴ Moral liberalism endorses some form of retributivism and apportions culpability based upon some assessment of moral culpability.¹⁶⁵ Neutral liberal

Compliance: A Comment on Posner's Law and Social Norms and Criminal Law Policy, 36 U. RICH. L. REV. 407, 410 (2002) [hereinafter Meares, *Signaling*]; Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 993 (2003); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 475–76 (1997). This is far from surprising. Analytic philosophy is far from being concerned only, or even primarily, with what is just or right. While sociological and analytic theories similarly distinguish between legitimate and justified authority, the sociological account rests upon an empirical theory of legitimacy that, at best, supplements the analytic account.

¹⁵⁹ Meares, *Norms*, *supra* note 158, at 399.

¹⁶⁰ See Meares, *Place*, *supra* note 20, at 679.

¹⁶¹ See, e.g., Meares, *Norms*, *supra* note 158, at 402–03; Meares, *Signaling*, *supra* note 158, at 414–21; Meares, *Social Organization*, *supra* note 158, at 214.

¹⁶² See, e.g., Livingston, *supra* note 25, at 67–72.

¹⁶³ See Jean Hampton, *Liberalism, Retribution and Criminality*, in IN HARM'S WAY: ESSAYS IN HONOR OF JOEL FEINBERG 159, 168–176 (Jules L. Coleman & Allen Buchanan eds., 1994) [hereinafter Hampton, *Liberalism*]. Hampton contrasts what she calls metaphysical liberalism with neutrality liberalism. I rely upon this distinction. See *infra* Part VII. See also Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1671–85 (1992) [hereinafter Hampton, *Correcting Harms*] (discussing retribution as a means of conveying the moral meaning of an act).

¹⁶⁴ Hampton, *Liberalism*, *supra* note 163, at 170 (emphasis removed).

¹⁶⁵ Other moral liberals would include C.S. Lewis, Herbert Morris, and Henry Hart. While Hampton and Morris disagree over some of the details of the moral liberal justification for punishment, see Hampton, *Correcting Harms*, *supra* note 163, at 1660–61, they agree upon

theorists are generally those influenced by the Rawlsian version of justice and use some version of the Rawlsian "veil of ignorance" to derive principles of punishment.¹⁶⁶ Neutral liberalism requires punishment in response to the breaking of these agreed-upon rules; such justifications tend to be utilitarian, derived from the value of deterring individuals from rule-breaking or rehabilitating those incapable (for whatever reason) of adhering to a system of rules.¹⁶⁷

Even under the retributivist or moral liberalism version of legal liberalism, the criminal law "method" operates as an enterprise in governance using general norms (or "directions," mostly prohibitions) to sanction the norm subjects for disobedience, where such sanction includes a "judgment of community condemnation."¹⁶⁸ In other words, even under the retributivist model, culpability must be imposed consequent to some form of general norm rather than on the basis of some neighborhood standard. This feature of generality distinguishes legal liberalism from the more community specific and discretionary approach to investigation and punishment proposed by the social norms model.

A third model of criminal justice organization is penal welfarism or, more loosely, the rehabilitative ideal. Some theorists consider that penal welfarism combines features of crime control and due process rather than providing an independent form of criminal justice legal process. For example, David Garland suggests that penal welfarism "combin[es] the liberal legalism of due process and proportionate punishment with a correctionalist commitment to rehabilitation, welfare, and criminological expertise."¹⁶⁹ For Garland, apparently, penal

the moral significance of punishment in establishing the individual as a moral being. See *id.* at 1667–68; HERBERT MORRIS, *Persons and Punishment*, in ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31, 31–57 (1979) [hereinafter MORRIS, *Persons*]; Herbert Morris, *Some Further Reflections on Guilt and Punishment*, 18 LAW & PHIL. 363, 363–78 (1999) [hereinafter Morris, *Further Reflections*]. So does Lewis. See C.S. Lewis, *The Humanitarian Theory of Punishment*, in THEORIES OF PUNISHMENT 301–08 (Stanley E. Grupp ed., 1971) (rejecting treatment model of punishment in favor of moral one that respects moral personhood of offender). Hart shares this perspective in rejecting the therapeutic in favor of a moral conception of criminal law concerned with the moral condemnation of the community. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 410 (1958).

¹⁶⁶ See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971); John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251 (1988); see also Jean Hampton, *Liberalism*, *supra* note 163, at 170–176. For a current version of the Rawlsian justification of punishment, see Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307 (2004).

¹⁶⁷ See, e.g., Hampton, *Liberalism*, *supra* note 163, at 170–76; Dolovich, *supra* note 166, at 321.

¹⁶⁸ Hart, *supra* note 165, at 402, 403, 404.

¹⁶⁹ GARLAND, *supra* note 2, at 27. On the basis of this comment, Garland would appear to place penal welfarism within the due process model of criminal justice procedure.

welfarism is somewhat derivative, in orientation if not procedurally, of the due process and crime-control models. Penal welfarism may, however, be understood as a distinctive type of process or procedure that is not primarily, if at all, concerned with proportionality, due process, or the type of correctionalism that is distinctive of crime control.¹⁷⁰ In fact, one of the major due process criticisms directed against penal welfarism has been its failure to consider issues of proportionality in replacing punishment with treatment.¹⁷¹

The underlying goal of penal welfarism is the reform of the delinquent character practiced through a process of intervention in the life of the offender.¹⁷² Rather than focus upon any particular form of investigation, penal welfarism attempts to develop sociological and psychological criteria by which to identify those individuals who are at risk, and then match the offender to treatment.¹⁷³ Penal welfarism thus empowers quasi-scientific expert authority and knowledge,¹⁷⁴ requiring the specialization of crime-control and rehabilitative modes of punishment under the guidance of criminological or penological experts,¹⁷⁵ and the marginalization of non-specialist lay people, "lawyers and moralists."¹⁷⁶ Rehabilitative or penal-welfarist procedures emphasize the role of discretion in "the individualization of treatment based upon expert assessment and classification."¹⁷⁷ Quasi-therapeutic disciplinary regimes replace traditional court

¹⁷⁰ Penal welfarism is also a mode of thinking about punishment. It may be, as Garland avers, that this sort of punishment has due process protections built in, *id.* at 27, but, again, I would dispute that claim.

¹⁷¹ See ALLEN, *supra* note 18. The juvenile court is generally regarded as the primary exemplar of penal welfarism. The court-led attack on the juvenile court system demonstrates the antagonism between penal welfarism and due process liberalism. See *In re Gault*, 387 U.S. 1, 15–21 (1967) (finding that the failing of juvenile court to protect juvenile rights is based in unconstitutional rejection of the juvenile's right to due process).

¹⁷² Garland himself acknowledges that "[t]he real focus of attention was upon *the delinquent, the criminal character*." GARLAND, *supra* note 2, at 42. Penal welfarism is thus synonymous with the "rehabilitative ideal." See *id.* at 35 ("In the penal-welfare framework, the rehabilitative ideal . . . was the hegemonic, organizing principle."); see also ALLEN, *supra* note 18, at 2 (describing the primary goal of the rehabilitative ideal as "effect[ing] changes in the characters, attitudes, and behavior of convicted offenders."). My description of penal welfarism relies upon Garland, but there is an extensive literature describing the rehabilitative ideal that supports his description.

¹⁷³ See GARLAND, *supra* note 2, at 40–46.

¹⁷⁴ See GARLAND, *supra* note 2, at 34, 40, 46.

¹⁷⁵ See Simon, *supra* note 1, at 237 (claiming that "[f]or much of the twentieth century [the influence] . . . of expert opinion . . . was reflected in the formalization of rehabilitation as an official ideology of state punishment from the 1940s through the 1970s"). See also GARLAND, *supra* note 2, at 34 (discussing the centrality of expertise to penal policy).

¹⁷⁶ GARLAND, *supra* note 2, at 40.

¹⁷⁷ GARLAND, *supra* note 2, at 34.

procedures and provide the justification of and content for rehabilitative styles of confinement or incarceration.¹⁷⁸

By the 1980s, penal welfarism had fallen into a seemingly terminal decline, thanks in large part to a strong rejection of the rehabilitative ideal and the perception that “nothing works” to cure crime.¹⁷⁹ In recent years, however, certain features of the penal-welfarist model have been resuscitated as part of a “therapeutic jurisprudence” movement that emphasizes the social and psychological impact of legal relationships upon the various participants in the legal process.¹⁸⁰

Therapeutic jurisprudence primarily requires “the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.”¹⁸¹ “Fundamentally, therapeutic jurisprudence focuses on the ‘sociopsychological ways’ in which laws and legal processes affect individuals involved in our legal system.”¹⁸² The emphasis is on looking outside legal doctrine “for promising developments in the clinical behavioral sciences and tries to think creatively about how such work may be imported into the legal arena . . . [it] looks not so much to law reform as to the reform of *practice*: it concentrates on how existing law, whatever its nature, may be therapeutically *applied*.”¹⁸³

One of the major themes in therapeutic jurisprudence is that “social adjustment [i]s a major goal of therapy.”¹⁸⁴ It is, however, not always clear what constitutes social adjustment: possible candidates are “‘psychological well-being,’ ‘restoration,’ and ‘self-esteem.’”¹⁸⁵ The process by which social adjustment is to be achieved appears to be through the internalization of socially adaptive

¹⁷⁸ See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 251 (1991); Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1118 (2000); DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980); Lawrence M. Friedman, *Dead Hands: Past and Present in Criminal Justice Policy*, 27 CUMB. L. REV. 903, 909 (1996–1997).

¹⁷⁹ GARLAND, *supra* note 2, at 108–09.

¹⁸⁰ See, e.g., LAW IN A THERAPEUTIC KEY, *supra* note 18; David B. Wexler, *Putting Mental Health into Mental Health: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 27–28 (1992); David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225 (1998).

¹⁸¹ Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, in LAW IN A THERAPEUTIC KEY, *supra* note 18, at 767.

¹⁸² Hora et al., *supra* note 8, at 444.

¹⁸³ David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691, 696–97 (1999)

¹⁸⁴ Slobogin, *supra* note 181, at 774.

¹⁸⁵ *Id.* at 780; see also *id.* at 792.

norms.¹⁸⁶ Internalization is accomplished through requiring the offender to “choose” the proffered treatment: the writings of Bruce Winick, a “co-founder” [along with David Wexler] of the movement,¹⁸⁷ have emphasized the “therapeutic value of choice,”¹⁸⁸ and many legal institutions influenced by the therapeutic movement engage in a form of “behavioral contracting” to ensure compliance with (and internalization of) therapeutic norms.¹⁸⁹

Bringing together the emphasis on social science, social adaptation, internalization, and contracting, drug courts have consistently emphasized the importance of the disease model of addiction in dealing with drug offenders; in practice, “[m]any of the DTC procedures reflect[] an understanding of addiction treatment very similar in substance to the Twelve Steps treatment protocol espoused by Narcotics Anonymous.”¹⁹⁰

B. Drug Court Procedure Under The Three Models: Is the Drug Court a Real Court?

Under the prior versions of the three criminal justice models, the courts maintained a neutral and objective orientation directed towards overseeing the criminal justice process.¹⁹¹ For the due process and crime-control models, the central issue surrounding the role of the court was at what point judicial oversight of the criminal justice process would begin.¹⁹² For penal welfarism, the issue was what amount of judicial deference to expert advice was appropriate. The whole point of the due process model was to cast the court as a neutral body that interposed itself between the executive branch and the criminal defendant. The crime-control model attempted to assure police discretion by delaying such interposition until relatively late in the criminal justice process. On either due process or crime-control models, the court was essentially neutral. Under the

¹⁸⁶ Accordingly, one way in which to distinguish therapeutic jurisprudence from social norms theories is to recognize that therapeutic jurisprudence requires the internalization of norms, whereas social norms theories do not. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 376–86 (1997).

¹⁸⁷ Slobogin, *supra* note 181, at 764.

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., Bruce J. Winick, *How Judges Can Use Behavioral Contracting*, in JUDGING IN A THERAPEUTIC KEY, *supra* note 18, at 227–30. The NADCP recommends contracting with offenders. See DRUG COURT STANDARDS COMM., *supra* note 45, at 7.

¹⁹⁰ Hora et al., *supra* note 8, at 474 n.155.

¹⁹¹ For example, the Supreme Court assented to the use of penal-welfarist expert advice in setting punishment, but still required the court to adopt a neutral role in determining sentence. See, e.g., *Williams v. New York*, 337 U.S. 241, 246–247 (1949).

¹⁹² See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 1–23 (1964).

penal-welfarist model, a neutral court determines what form of more or less invasive “treatment.”¹⁹³ Or “individualized, therapeutic justice”¹⁹⁴ is warranted on the basis of expert advice. The court remains somewhat passive, imposing psychosocial “mechanisms of power,”¹⁹⁵ premised upon understanding¹⁹⁶ the offender as a deviant or delinquent personality¹⁹⁷ and an object of scientific knowledge and control.¹⁹⁸

This current model of procedure is truly innovative. Under the traditional penal-welfarist model of court procedure, although there were less due process protections for offenders,¹⁹⁹ the court’s role was nominally passive. The offender had less due process protections precisely so that the court could enable the expert to work upon the offender more efficiently. Due process protections were lowered to reduce the legal hurdles standing in the way of efficiently channeling offenders into expert treatment.

The drug court does provide increased due process protections as compared to prior penal-welfarist courts. Even offenders sentenced under the pre-plea version of drug court have rights to a speedy trial and judgment that they must waive as a condition of entry.²⁰⁰ In a post-plea diversion scheme, the defendant has already admitted her guilt and waived her rights to a speedy trial and determinate sentence. However, she has had the benefit of the full panoply of

¹⁹³ Justice Stewart endorsed the medico-legal goals of the juvenile court system in his dissent in *Gault*. *In re Gault*, 387 U.S. 1, 78–81 (1967) (Stewart, J., dissenting).

¹⁹⁴ John R. Sutton, *The Juvenile Court and Social Welfare: Dynamics of Progressive Reform*, 19 LAW & SOC’Y REV. 107, 110 (1985). See also Marcia Johnson, *Juvenile Justice*, 17 WHITTIER L. REV. 713, 718 (1996) (describing the juvenile court system as a “therapeutic system of justice for children”).

¹⁹⁵ See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977*, at 39 (Colin Gordon ed., 1980); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY VOLUME I: AN INTRODUCTION* 97 (1990). For an introduction to Foucault’s understanding of power, see *id.* at 92–102.

¹⁹⁶ See FOUCAULT, *supra* note 178, at 251.

[T]he offender becomes an individual to know. This demand for knowledge was not, in the first instance, inserted into the legislation itself, in order to provide substance for the sentence and to determine the true degree of guilt. It is as a convict, as a point of application for punitive mechanisms, that the offender is constituted himself as the object of possible knowledge.

Id.

¹⁹⁷ See, e.g., *Gault*, 387 U.S. at 23–24 (discussing “disconcerting” use of the term “delinquent”). Michel Foucault considers that the “carceral system” exists precisely to produce individuals as “delinquent” as a “pathologized subject.” FOUCAULT, *supra* note 178, at 277.

¹⁹⁸ See FOUCAULT, *supra* note 178, at 251.

¹⁹⁹ See, e.g., *In re Gault*, 387 U.S. 1, 17 (1967).

²⁰⁰ E.g., Cal. Penal Code § 1000.1(a)(3) (Deering 2004).

protections afforded by the criminal justice process, including the requirement that she knowingly and intelligently waive her right to trial. The rights implicated are those of an admitted criminal during and after the sentencing process.

The drug court movement does, however, envisage a much more active role for the judge than the traditional penal-welfarist court. In drug court, the judge is the expert; she is no longer an official tasked with balancing the opinions of expert, prosecutor, and defender.²⁰¹ The drug court judge adopts an active, rather than passive, role, seeking to establish a direct, therapeutic relationship with the offender. While penal and therapeutic experts still have a role to play in advising on treatment options, therapeutic jurisprudence and penal welfarism recharacterize the relationship between judge and offender as itself therapeutic—indeed, the primary therapeutic relationship available to the offender.²⁰² The judge is empowered to assess and enforce compliance with the various treatment options based on this relationship, including more or less onerous sanctions.²⁰³

One of the distinctive features of drug court, then, is that it rejects the passive model assumed by the crime-control and due process models, and takes a much more active role. In this way, it is a quasi-expert institution in the manner of the penal-welfarist model. Under that model, however, there was some sort of deference to expert opinion; the court's expertise in sentencing was primarily moral; therapeutic expertise was exercised through a probation officer's or psychologist's contribution to the pre-sentence report, which the judge would take into account when determining how to sanction the criminal.²⁰⁴

Drug courts present a much different situation, one in which the court is cast as the penological expert. The relationship between judge and offender becomes primary;²⁰⁵ the judicial encounter with the offender provides the raw data upon which treatment decisions are based. Such a relationship is not incidental to the drug court: it is essential, because it places the judge as a direct and powerful "social influence" upon the offender.²⁰⁶ Accordingly, Judge Cooper's quasi-

²⁰¹ See, e.g., *Williams v. New York*, 337 U.S. 241, 246–247 (1949).

²⁰² Simmons, *supra* note 71, at 259; NOLAN, *supra* note 3, at 105. See generally *id.* at 100–06.

²⁰³ See NOLAN, *supra* note 3, at 196; Susan Turner et al., *A Decade of Drug Treatment Court Research*, 37 SUBSTANCE USE & MISUSE 1489, 1491 (2002).

²⁰⁴ See, e.g., *Williams*, 337 U.S. at 246–47.

²⁰⁵ See Hora et al., *supra* note 8, at 476–77, 531; NOLAN, *supra* note 3, at 43, 101–04.

²⁰⁶ The concept of social influence is taken from the social norms literature. "Social influence" gives the concept an empiricist twist; it "is the term that social psychologists use to describe the propensity of individuals to conform to the behavior and expectations of others." Meares & Kahan, *Inner City*, *supra* note 20, at 813; see also Kahan, *supra* note 120, at 352 ("The concept of social influence refers to a pervasive and familiar phenomenon in our economic and social life: namely, that individuals tend to conform their conduct to that of other individuals."). Social influence plays an important role in the drug court theater. See NOLAN,

Pavlovian analogy of modifying an addict's behavior to training a pet is not a misunderstanding of the relationship, but a rather blunt statement of it.²⁰⁷

Further, the courtroom theater central to the therapeutic understanding of the court may also be presented in social norms terms. The courtroom practice views the court as a model community, one that serves to emphasize the judge as channeling community norms of correct behavior. This judicial function is supplemented by the use of the jury box to serve as a penitent's bench for relapsed offenders and ceremonies celebrating each stage of recovery. The relative disempowering of the other courtroom players is thus essential to the structure of the drug court as transmitter of norms of law-abiding behavior. Dissent is suppressed so as to clearly express the message of law abiding behavior and recovery; the relationship between judge-as-social-influence and offender is prioritized; the judge is empowered with a great deal of otherwise private information about the offender's drug habits and may supplement such information by ordering the offender to immediately provide a urine sample.

Evaluations of the propriety of this style of court procedure vary depending upon which of the criminal justice models one endorses. It is least likely to appeal to due process liberal legalism, which seeks to impose some form of rule-like constraint upon the courtroom practice of imposing sanctions. Nonetheless, the type of sentence imposed may appeal to some legal liberalism scholars.²⁰⁸ Crime control and due process models express different comfort levels with drug court process, dependent in part upon the stage of the criminal justice process at which the drug court operates.

Social norms versions of drug courts endorse the court's procedures on the understanding that the institutions applying them "are not courts at all, but diversion-to-treatment programs, which are supervised through regular (usually monthly) quasi-judicial status hearings at which the drug court judge enters into a dialogue with each defendant about his or her progress in the treatment/rehabilitation program."²⁰⁹ In this circumstance, the drug court "may be viewed as 'a specialized form of probation, available to a different class of defendants but sharing many similarities with general probation and commitment for addiction.'"²¹⁰ This view has gained a certain currency.²¹¹ On this view, drug

supra note 3, at 101–04. At least one judge has expressed the relationship between judge and defendant in terms of "parenting." *Id.* at 103.

²⁰⁷ Cooper, *supra* note 91, at 23.

²⁰⁸ See, e.g., Hampton, *Liberalism*, *supra* note 163, at 159–82.

²⁰⁹ Boldt, *supra* note 13, at 1252 (quoting Caroline S. Cooper & Joseph A. Trotter, Jr., *Recent Developments in Drug Case Management: Re-engineering the Judicial Process*, 17 JUST. SYS. J. 83, 93 (1994)); see also Dorf & Sabel, *supra* note 31, at 852.

²¹⁰ *People v. Cisneros*, 100 Cal. Rptr. 2d 784, 788 (Cal. App. 2000) (quoting *People v. Superior Court (On Tai Ho)*, 520 P.2d 405, 410 (Cal. 1974)).

courts should be described as non-adversarial rehabilitation institutions that have their procedures over-determined by the personality of the judge, transforming them into glorified probation programs. Drug court advocates can then justify the most controversial aspect of the court—its courtroom procedures—by claiming these courts are outside the adjudicative realm. As such, drug courts are not required to furnish the due process protections provided by fully-fledged adjudicative institutions.

Dorf and Sabel appear to focus on the non-adversarial structure of drug courts to support the claim that drug courts are non-judicial enterprises based upon the observation that, at the sentencing stage, “[t]he treatment court judge adjudicates no disputed issues.”²¹² Selecting this feature is potentially misleading: in a post-plea program the absence of disputed legal issues is unsurprising. Under the Brooklyn model, upon which Dorf and Sabel base their observations²¹³ and which is a post-plea program, the parties have already agreed to a guilty plea. As a practical matter, if there remained a dispute between the parties as to the terms of the plea, no plea could or should be entered. Significant factual matters, such as compliance with the terms of the program, however, remain. The outcome of such disputes has important consequences for the offender’s liberty interests. These consequences are often not within the power of non-judicial officials to decide.

It is true that the drug court judge may adopt many of the techniques employed by probation officers or social workers in caring for drug-addicted offenders. This is an essential part of his or her therapeutic role. Nonetheless, the judge retains and exercises powers that are beyond the scope of any but judges properly so called. His or her powers are judicial in important respects, and the drug court retains many of the features indicative of a court. There are at least two situations in which the drug court is required to act in a fully judicial or adjudicative manner: during sentencing and again during the status hearing process, where the court determines the consequences that flow from the defendant’s compliance or non-compliance with the rehabilitation program. Furthermore, the power to dismiss the charge and remove all stigma of criminality is as important a carrot as the power to imprison is a stick. Neither may be wielded by a probation officer without the sanction of a judge.

²¹¹ Cooper & Trotter address this issue in an unduly vague manner. Certainly, in the manner described by Cooper and Trotter (whom Boldt relies on for his assertion that drug courts are not courts), the drug court appears in a form quite dissimilar to the usual variants: they are “nonpunitive” and the harshest sanction appears to be termination of participation in the drug court program. Cooper & Trotter, *supra* note 209, at 93. For example, Cooper and Trotter make no mention of the option of short periods of incarceration that are usually considered essential to the drug courts’ role. *See id.* at 93–98.

²¹² Dorf & Sabel, *supra* note 31, at 852.

²¹³ *See id.*

What is at stake in the argument over the institutional status of drug courts is, first, the propriety of creating a judicial institution to oversee rehabilitation and, second, the procedures by which such an institution should be run, given the powers therein exercised.²¹⁴ If drug courts are formally and factually courts, then under the due process model at least, a different set of standards of behavior and procedure apply to the court officials than apply to probation officials. Due process, therefore, requires that the form of decision-making appropriate to the liberty revocation process is adjudication.²¹⁵ That process requires adversarial argument by zealous advocates and is administered by an impartial judge.

Social norms theorists find it relatively easy to endorse the increased discretion allotted to quasi-probation officials. They appear willing to tolerate such discretion in the hands of judges so long as the judicial process is fully transparent to the local social norms supposed to control the law enforcement process.²¹⁶ Generally, however, social norms theorists concentrate on the role of the drug court as an experimentalist institution mediating between different forms of treatment provider and different sources of community feedback.²¹⁷ That is perhaps because the therapeutic jurisprudence model that dominates most of the drug courtroom practice emphasizes therapeutic expertise and the centrality of the disease model in a manner that restricts the influence of community norms. The differing impact of these different models, one based on rational choice theory, one on the medical model of addiction, is the subject of the next section.

IV. DO DRUG COURTS “TREAT” ADDICTED OFFENDERS?

A central issue in the justification of the drug court as a penal institution is how to characterize its procedures. I have suggested that the available critiques change depending upon whether the court is primarily a penal-welfarist therapeutic institution or a crime-control social norms one, or engages in due process liberal legalism. The characterization of drug courts as primarily engaging in treatment is often presented as the sole available explanation or justification. In fact, as a seminal Supreme Court debate makes clear, therapeutic justifications, when presented in the criminal context, must be understood as embodying other extant criminal justice categories. Of the remaining justifications for drug court,

²¹⁴ See Hoffman, *Scandal*, *supra* note 13, at 1473–79.

²¹⁵ See Sandin v. Conner, 515 U.S. 472, 484 (1995); Washington v. Harper, 494 U.S. 210, 221–22 (1990) (decision to use restraints); Vitek v. Jones, 445 U.S. 480, 493 (1980) (transfer to mental hospital).

²¹⁶ Ensuring legal legitimacy through correlating legal and local norms is a major theme for social norms theorists. See, e.g., Meares, *Signaling*, *supra* note 158, at 415–16; Meares, *Place*, *supra* note 20, at 680; Meares, *Norms*, *supra* note 158, at 413–14; Meares & Kahan, *Inner City*, *supra* note 20, at 816; see also Dorf & Sabel, *supra* note 31, at 879.

²¹⁷ See Dorf & Sabel, *supra* note 31, at 847–51.

the social norms version of crime control sits more comfortably with the invasive practice endorsed by most of the courts. While there may be some due process rationales supporting the drug court, these are harder to employ in light of the procedure applied in particular courts. The task for the critic is therefore, first, to understand the benefits and burdens of adopting a particular descriptive paradigm and, second, to determine how well the drug court performs under each.

This section introduces the Supreme Court's debate in *Robinson v. California*²¹⁸ and *Powell v. Texas*.²¹⁹ That debate engages with the dominant treatment philosophy used in drug courts: the disease model of addiction. The *Robinson* and *Powell* opinions interrogate the availability of the disease model as a means of understanding criminal responsibility and its consequences for the treatment or punishment of offenders. In contrast to the disease model, I introduce a volitional model. Where the disease model is primarily compatible with penal welfarism, the volitional model comports best with the crime-control version of social norms or the retributive or moral liberalism version of the due process accounts of criminal responsibility.²²⁰ While neither model wins out, there are important outcomes for the treatment of addicts depending upon which model predominates.

A. Drug Courts and the Disease Model of Addiction

Most drug treatment programs understand addiction as a disease: a biologically induced susceptibility to cravings for the addictive substance,²²¹ which may be more or less controllable, depending on the individual addict. Under this disease model of addiction,²²² the addict's propensity to the cravings never subsides. Rather, her susceptibility is permanent, easily triggered, and requires constant vigilance in order to remain under the addict's control.²²³ The disease model of addiction, although enjoying some scientific support, is currently controversial even among the medical community.²²⁴ It has received its

²¹⁸ 370 U.S. 660 (1962).

²¹⁹ 392 U.S. 514 (1968).

²²⁰ See Hampton, *Liberalism*, *supra* note 163, at 168–76. Hampton contrasts what she calls “metaphysical” liberalism with “neutrality” liberalism. I rely upon this distinction. See *infra* Part VII.

²²¹ See Hora et al., *supra* note 8, at 464–69.

²²² See, e.g., Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2296–2307 (1992).

²²³ Fingarette, *Addiction*, *supra* note 101, at 413–17, 419–26, 433–43; Fingarette, *Perils*, *supra* note 101, at 808–12; see also *Powell*, 392 U.S. at 518 (discussing disease model of addiction).

²²⁴ See, e.g., *Powell*, 392 U.S. at 522. For a discussion of addiction as explained by social factors, rather than the disease model, see Gene M. Heyman, *Is Addiction a Chronic, Relapsing*

strongest endorsement from a variety of twelve-step programs used to treat alcohol and narcotic addiction, which in turn enjoy considerable support within the criminal justice system.²²⁵

The disease model emphasizes the congenital susceptibility of the addictive character, in part to negate the responsibility of the addict for her addictive behavior by describing addiction as an illness and refusing to condemn the addict for having the illness.²²⁶ One way in which the disease model attempts to rebut the moral responsibility of the addict is to identify addiction as a form of “weakness of the will” or *akrasia*.²²⁷ “Here the claim is that the addict might know perfectly well what he is doing, and might know perfectly well what he ought to do, so that no defect of reason is involved; nevertheless his behavior is not under his control, however that might be construed.”²²⁸

Weakness of the will is often understood as a motivational failure: one might recognize that, acting rationally, we ought to perform a particular act or resist a particular temptation—ingesting addictive intoxicants, for example—and we even possess the higher order desire to act rationally.²²⁹ We act against our will, however, due to the difference between what one has the most reason to do, what one ought to do, and what one is motivated to do, what one desires to do; that is, when our motivations or desires fail to coincide with our reason then our higher order desire to act rationally fails to guide the manner in which we act.²³⁰ On this view, whether or not we act for good reasons depends upon an “alignment” of reason and desire, and that “is not really something that is up to the agent to determine.”²³¹ This claim would work to justify the disease model of addiction by suggesting that the addict’s cravings are not subject to rational control but rather

Disease?, in *DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE* 81, 81–117 (Philip B. Heyman & William N. Brownsberger eds., 2001).

²²⁵ PEELE & BUFE, *supra* note 101, at 30–38.

²²⁶ See Fingarette, *Addiction*, *supra* note 101, at 426–27, 433–43 (discussing role of involuntariness in disease model); Fingarette, *Perils*, *supra* note 101, at 800–08 (same).

²²⁷ For an extended discussion of the manner in which addiction is a form of *akrasia*, see R. Jay Wallace, *Addiction as Defect of the Will: Some Philosophical Reflections*, 18 *LAW & PHIL.* 621, 621–54 (1999).

²²⁸ Michael Louis Corrado, *Addiction and Responsibility: An Introduction*, 18 *LAW & PHIL.* 579, 587 (1999).

²²⁹ See, e.g., Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 *J. PHIL.* 5 (1971); see also Boldt, *supra* note 222, at 2245, 2246–64 (discussing both Frankfurt and Watson).

²³⁰ See, e.g., Boldt, *supra* note 222, at 2254–64 (discussing Frankfurt’s volitional model and Watson’s normative model of rational reflection and free will). A stronger version of this claim is made by David Hume, who asserted that “[r]eason is, and ought only to be the slave of the passions” DAVID HUME, *A TREATISE OF HUMAN NATURE*, 415 (L.A. Selby-Bigge ed., Oxford U. Press 1979) (1739).

²³¹ Wallace, *supra* note 227, at 635.

stem from a pathological, biological, or characterological defect such that the addict is congenitally incapable of acting in conformity with her higher-order rational desire for sobriety when faced with the addictive stimulus.

The disease model of addiction is strongly endorsed by many drug court judges.²³² Both are focused upon understanding the addict's pathological behavior as a disease and providing some form of civil, rather than criminal, solution to his or her problems. The criminal law concepts of guilt and blame are rejected because the moral stigma they impose impedes treatment. In its therapeutic jurisprudence form, the disease model suggests that the addict has a pathological character for which she is not responsible but which is amenable to treatment. Like penal welfarism, the disease model may, on occasion, be compatible with the administrative or due process models of crime control, although these models may also operate to limit its operation in certain circumstances. The disease model, however, incompletely accounts for the experience of addiction even where *akrasia* is the dominant philosophical justification for the addicts condition.

A problem with the disease model of addiction's explanation of weakness of the will is that it assumes all weaknesses are the same.²³³ Instead, *akrasia* may have to take account of a volitional aspect of the conflict between lower- and higher-order desires. The disease model, like theories of *akrasia* more generally, is an all-or-nothing account of responsibility. The *akratic* agent cannot choose otherwise and so should not be blamed for his or her choices.

An alternative account depends upon a distinction between higher- and lower-order desires. Our higher-order desires are those produced by rational reflection on what it is best to do, all things considered. Higher-order desires include our long-term goals or our attitude towards our long-term goals. Lower-order desires represent what we unreflectively want or wish to do in the short term, perhaps even though we know that such acts are not in our long-term interest. Generally, we are not simply slaves to our desires but are able to choose to act on them or not. This volitional aspect adds an important wrinkle to the concept of *akrasia*,²³⁴ because it suggests that giving in to our desires is not always something that we reject or disavow, but something that we choose or endorse.²³⁵

²³² The disease model undergirds the twelve-step recovery process dominating drug court thinking. See Hora et al., *supra* note 8, at 511; Lafferty, *supra* note 101, at 26. Compare Winick & Wexler, in JUDGING IN A THERAPEUTIC KEY, *supra* note 101, at 108–09 (suggesting that therapeutic jurisprudence need not endorse the disease model).

²³³ *Id.* at 636–67.

²³⁴ Wallace, *supra* note 207, at 636–67.

²³⁵ As Stephen Morse put it: “volitions are not wants or desires: on the best theory, they are a species of intention.” Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1597 (1994). Thus, when we choose to act—when we intend to act in a particular

Under the volitional account, the problem presented by weakness of the will—and temptation more generally—is that giving in to the lower-order desire may or may not be morally blameworthy, dependent upon the ability of choice—volition—to tip the balance one way or another.

The volitional account does not negate the disease model. Individuals whose higher-order desire is particularly weak or whose lower-order desire is extremely strong are less likely to require the volitional component to tip the scales on a given occasion. The volitional account does, however, suggest that some form of moral condemnation may be appropriate where the strength of the competing desires leaves room for the real possibility of rational choice. In this case, the volitional determination to give in to the craving is the decisive factor.

Thus, while the addict may initially contract the disease involuntarily, it is not clear that the addict's subsequent acts in "feeding" the disease are similarly unchosen.²³⁶ There are a variety of ways in which to understand the resulting addiction that do not depend upon the complete abdication of will that is a feature of the disease model. Instead, we can explain addiction as a rational, albeit short-term, response to the cravings and the agent as responsible for her choice to take the drugs. Under the social norms version of crime control or the due process retributivist theory, that choice is blameworthy.

A competing description of the problem of addiction is that the satisfaction of the desire or craving constitutes a rational choice to satisfy the addict's immediate interest. Admittedly, one might want to argue that the addict incompletely or incorrectly understands those interests. Nonetheless, a mistaken evaluation is not an irrational one. Problems with evaluation can be solved simply by providing the addict with a different, better understanding of his or her interests. That, in turn, can be accomplished by providing additional incentives or disincentives to stress the relative values of the available options.

The use of law to change incentives to encourage rational actors to engage in law-abiding behavior is a major feature of social norms theory. Traditional rational choice theories suggest that, given the onerousness of the sanction, if the

manner, that is, act on the basis of a volition—our act ceases to be one that is overcome by *akrasia* and once again enters the realm of morality and responsibility.

²³⁶ There are a number of philosophical explanations of addiction that cover these different viewpoints. In his introduction to the papers on addiction and legal responsibility delivered at the Second North Carolina Workshop in Law and Philosophy, held September 25–27, 1998, at the National Humanities Center near Durham, North Carolina, Michael Louis Corrado identifies four different types of addiction: (1) rational addiction, where addictive behavior is considered a pleasure-maximizing response to the craving; (2) addiction as duress, where addictive behavior is still considered rational but understood as a pain-minimizing response to the craving; (3) addiction as distortion, where addictive behavior is premised upon an irrational and distorted understanding of the addict's interests; and (4) addiction as defect of will, where the addict may understand that she is acting against her interests but be powerless to (form the intention to) behave otherwise. See Corrado, *supra* note 228 at 583–85. The disease model most closely matches addiction as a defect of the will.

agent is rational she will conform her behavior to the legally determined standards.²³⁷ Sociological theories attempt to determine the manner in which a rational agent will understand and internalize the sanction as part of their general attitude towards other, legal and non-legal, norms of conduct.²³⁸ The sociological perspective gives weight to the meaning that the agent and the social groups that engage in the practice place upon her actions and mediates individual assessments of value.²³⁹

Accordingly, sociological theories seek to support law-abiding social norms and undermine law-breaking ones.²⁴⁰ On the one hand, the government must identify and reinforce socially authoritative individuals or institutions that exert a positive social influence.²⁴¹ On the other hand, the government must seek to undercut those individuals or institutions that exert a negative social influence. Somewhat strikingly, Meares and Kahan promote a range of strongly interventionist law enforcement procedures, including church-state

²³⁷ See Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1559 (1998) (noting that "[t]he rational-choice economist asks what 'rational man' would do in a given situation" as a means of predicting what individuals will do in fact).

²³⁸ See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1006 (1995).

²³⁹ See Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2181-83 (1996).

²⁴⁰ See Lessig, *supra* note 238.

²⁴¹ Meares, *Praying*, *supra* note 158, at 1619.

[O]rganization leaders are located in various social networks and operate within different spheres of influence. Bringing these institutions together can have an important impact on the ability of a community to assert social order. Collaboration between leaders of different groups would enable them to form "weak ties" with each other and would allow the individual leaders to access resources to help their [communities] as well as to build a stronger base to influence the public level of social control.

Id.

partnerships,²⁴² youth curfews, and anti-loitering ordinances,²⁴³ to achieve the confluence of social and legal authority.²⁴⁴

Alternatively, one might take a retributivist, rather than treatment oriented, approach to addictive behavior. The retributivist would argue that some kind of moral norm precludes punishing an involuntary act.²⁴⁵ Nonetheless, where the act is voluntary one can only respect the agent's moral status by punishing.²⁴⁶ Accordingly, although a diminished capacity for voluntary action may operate to excuse, whether partially or completely, some forms of behavior or to mitigate punishment, so long as the behavior is to some extent voluntary, then punishment is appropriate.²⁴⁷

Addiction, so understood, limits, rather than eliminates, responsibility. The addict's cravings diminish but do not remove his or her capacity for meaningful choice among a range of legal and illegal options. Thus, some versions of the disease model do not suggest that the addict is unaware of the moral consequences of her actions—that he or she is breaking the law or engaging in anti-social behavior.²⁴⁸ Rather, the addict experiences a greater or lesser need to satisfy the addictive cravings. The relative inability to resist the cravings may therefore be less, or non-, blameworthy when ingestion can be presented as

²⁴² *Id.* at 1617.

²⁴³ Kahan & Meares, *Coming Crisis*, *supra* note 20, at 1164.

Curfews can help to promote such community infrastructure by assisting adults in the community-wide monitoring of teens. Enforcement of loitering laws and the restoration of order can help to promote friendship networks by encouraging community adults to engage in collective guardianship rather than solo efforts. The effect of curfews, gang-loitering, laws, order-maintenance policing in restoring norms of order in the inner-city thus deserves a critical share of the credit for the decline of crime rates in the 1990's.

Id. See also Meares, *Place*, *supra* note 20, at 695.

²⁴⁴ See Meares & Kahan, *Inner City*, *supra* note 20; Kahan & Meares, *Coming Crisis*, *supra* note 20.

²⁴⁵ See, e.g., HERBERT MORRIS, *Punishment for Thoughts*, in ON GUILT AND INNOCENCE, *supra* note 165, at 24–26.

²⁴⁶ See MORRIS, *Persons*, *supra* note 165, at 31–57; Morris, *Further Reflections*, *supra* note 165, at 363–78; Hampton, *Liberalism*, *supra* note 163, at 168–76; Hampton, *Correcting Harms*, *supra* note 163, at 1671–85.

²⁴⁷ This approach receives much support from explanations of addiction that consider the choice to take drugs a preference rather than a biological imperative. If drug use is “ambivalent,” providing “immediate positive immediate consequences . . . but delayed adverse consequences,” then drug use may be somewhat rational although not fully culpable. See Heyman, *supra* note 224, at 103, 108–09 (suggesting that drug use is not rational in the economist's sense).

²⁴⁸ This is true not only of the pleasure-maximizing or pain-minimizing conceptions of addiction, but also of the distortion model, where the addict may know that she is breaking the law but fail properly to account for that when considering her interests.

justified or excused. That will depend upon whether the cravings or other conditions so adversely affect the decision-making process as to significantly distort choice or undermine the addict's will to resist. When there is minimal justification or excuse and the cravings are moderate or few mitigating conditions are present, however, ingestion will be more blameworthy.

Thus, although biological or psychological factors limiting the addict's ability to refuse drugs are relevant, they need not provide the whole story. A variety of social factors are also relevant. Responsibility will depend upon some combination of the two—biological/psychological and social. Where social factors predominate and responsibility-maximizing behavior is constrained, the addict's response may still be rational. In this case, addictive behavior is not a more or less automatic response to a stimulus in the manner proposed by the strong therapeutic version of the medical model. Rather, under the social norms rational choice model, the addict's behavior is susceptible to modification through manipulating his or her evaluation of the interests at stake.²⁴⁹ Where biological or psychological factors predominate, addictive behavior will be non-culpable (that is, justified or excused) only where these factors overcome the addict's ability to make a reasoned choice or the addict is otherwise permitted to ingest the addictive substance. Accordingly, under the due process retributivist theory, punishment is improper only when the addict's will is so totally overcome that her act is no longer morally culpable.

1. *Status and Choice: The Supreme Court Debate*

The choice between the disease and volitional models of addiction has great significance for the criminal law. If drug use is the behavioral component of a disease, then it is non-culpable and should not be sanctioned. If drug use is volitional then, on the social norms crime-control theory and the retributivist version of due process, the offender ought to be punished, either as a means of communicating and reinforcing social norms or as a means of characterizing the offender as a morally autonomous being.²⁵⁰ Therapeutic penal welfarism, on the other hand, presents addiction, like any illness, as unsought. In the case of addiction, it is a propensity that is biologically or psychologically pre-determined and so not fully within the addict's control. Accordingly, the addict should not be

²⁴⁹ For example, by increasing the criminal penalties for drug use, increasing the likelihood that such penalties will be imposed through better policing, or increasing treatment opportunities.

²⁵⁰ See, e.g., Meares & Kahan, *Inner City*, *supra* note 20 (discussing legal and social norms as communicating attitudes to crime); Hampton, *Correcting Harms*, *supra* note 163, at 1667–68 (discussing punishment as respecting the individual as a moral being); MORRIS, *Persons*, *supra* note 165, at 31–57 (same).

held morally culpable for his or her status as an addict.²⁵¹ This penal-welfarist perspective attempts to decriminalize the problem of addiction by explaining it as a pathology requiring treatment rather than a rational choice permitting punishment.

Another justification for the disease model may be provided by the neutral liberal version of due process. Neutral liberalism, as we have seen, is characterized by a process-oriented attempt to formulate the governing norms of public justice independent of any particular moral perspective.²⁵² Neutral liberalism therefore provides what H.L.A. Hart has called a “content independent” justification for public norms:²⁵³ it is the process by which the norms are formulated, rather than the content of those norms, that assures their validity.²⁵⁴ Public norms may be—and are—accepted or justified by the public for a variety of (sometimes conflicting) reasons.²⁵⁵

Under neutral liberalism, the purpose of punishment is therefore not tied to any particular moral perspective and so non-moral. Moral sanctions would undermine the neutrality of the rule-formulating process by privileging one outcome or justification over the others.²⁵⁶ The justification for punishment, on this view, is that the rules everyone agreed upon, or would have agreed upon, during the process of rule-formulation have been broken; the purpose of punishment is to ensure that everyone conforms to those norms that were, or would have been, enacted by a neutral process.²⁵⁷

Neutral liberalism is thus compatible with the provision of an interventionist safety net to catch and treat drug addicts. On the neutral liberalism model, some form of social welfare safety net could and perhaps should exist for the worst off. The worst off would include addicts unable to abide by society’s public norms due to some form of irresistible craving. So long as the agent is congenitally

²⁵¹ See, e.g., Hora et al., *supra* note 8, at 464–69.

²⁵² See, e.g., Hampton, *Liberalism*, *supra* note 163, at 170–76; Dolovich, *supra* note 166, at 316–46.

²⁵³ H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 254 (1982); see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35 (1986). Reasons are content-independent if they are “intended to function as a reason independently of the nature or character of the actions to be done.” HART, *supra*, at 254.

²⁵⁴ HART, *supra* note 253; see also RAZ, *supra* note 253.

²⁵⁵ See Hampton, *Liberalism*, *supra* note 163, at 170–76 (stating that neutral liberalism entails rules justified as compatible with competing moral and religious perspectives); HART, *supra* note 253, at 256–58 (stating that citizens accept content-independent norms for any reason or no reason).

²⁵⁶ See Hampton, *Liberalism*, *supra* note 163, at 171–72.

²⁵⁷ See *id.* at 170–72.

unable to follow the agreed-upon rules, some form of intervention is mandated and may be justified by incapacitation or, more likely, rehabilitation.²⁵⁸

Both neutral liberal and penal-welfarist justifications are also compatible with a variety of more or less incapacitatory treatments. For example, Alcoholics Anonymous and Narcotics Anonymous both use the disease model to justify perpetual surveillance through regular and time-consuming attendance at official meetings. The potentially onerous nature of such a regime is supposed to be offset by the therapeutic goals of treatment. Where such regimes involve more or less extreme elements of surveillance and detention redolent of the administrative model, such programs are justified as diverting offenders from prison. The diversion claim enables such programs to evade due process concerns.

Simply put, the disease model, endorsed under the principles of therapeutic jurisprudence by drug court judges,²⁵⁹ sits oddly with one of the central requirements of the criminal law: that we inflict punishment only for voluntary acts.²⁶⁰ By endorsing the disease model, the manner in which therapeutically inclined drug court judges attempt to accommodate the criminal law is by denying it away, identifying the problem of addiction as concerned not with voluntary, but with involuntary acts.²⁶¹ It is perhaps worth turning to the Supreme Court cases that most directly address this issue. In *Robinson v. California*,²⁶² the Court held that a California statute making it a criminal offense to "be addicted to the use of narcotics"²⁶³ was a violation of the Eighth Amendment's prohibition on cruel and unusual punishment.²⁶⁴ Voluntariness was at the heart of *Robinson*: the Court determined that the statute at issue failed to require a voluntary act and strongly indicated that addiction was sufficiently involuntary to preclude criminal liability.²⁶⁵ *Robinson* therefore established that a state may not use the criminal law to punish an individual for having a particular status or condition but only for criminally culpable acts.

The second, *Powell v. Texas*,²⁶⁶ concerned a Texas statute criminalizing public intoxication.²⁶⁷ The Court distinguished between the status of being an

²⁵⁸ See Dolovich, *supra* note 166, at 370–74.

²⁵⁹ See, e.g., Hora et al., *supra* note 8, at 464–69.

²⁶⁰ See Boldt, *supra* note 222, at 2304–08.

²⁶¹ This, as we shall see, is Justice Douglas's view in *Robinson v. California*, 370 U.S. 660, 671–78 (1962) (Douglas, J., concurring).

²⁶² 370 U.S. 660 (1962).

²⁶³ CAL. HEALTH & SAFETY CODE § 11721 (repealed 1972).

²⁶⁴ *Robinson*, 370 U.S. at 667.

²⁶⁵ *Id.*

²⁶⁶ 392 U.S. 514 (1968).

addict or alcoholic and the voluntary acts taken by addicted individuals and refused to preclude the State from using the criminal law to regulate public behavior related to a pre-existing condition or disease.²⁶⁸ *Powell* rejected the claim that public intoxication consequent to alcohol addiction was involuntary and instead adopted the (more or less retributivist) position that the original decision to become intoxicated in public was sufficiently culpable as to render the resulting behavior criminal.²⁶⁹

The difference between the *Robinson* and *Powell* opinions consists in their attitude toward penal welfarism and the disease model of addiction. The *Robinson* Court's 6–2 majority split into three different positions on the subject of the propriety of the disease model and the provision of treatment for addiction.²⁷⁰ Justice Douglas wholeheartedly endorsed the disease model.²⁷¹ Justice Harlan considered the disease model irrelevant.²⁷² Justice Stewart's opinion takes a position somewhere in between the two and could be considered a qualified endorsement of the disease model of addiction.²⁷³ In *Powell*, on the other hand, Justice Marshall²⁷⁴ authored a plurality opinion, joined by Justices Warren, Black, and Harlan, who had been in the *Robinson* majority. Justice Marshall robustly rejected the application of the disease model to criminal acts.²⁷⁵ Justice White wrote separately, concurring in the result. He suggested that it may be unconstitutional to punish involuntary acts caused by a particular disease or condition.²⁷⁶ He concluded, however, that there was no evidence that *Powell*'s behavior was anything other than a voluntary act.²⁷⁷ Justice Fortas authored a dissenting opinion in which the other half of the *Robinson* majority joined.²⁷⁸ He endorsed a strong version of the disease model of addiction.²⁷⁹ Any act

²⁶⁷ TEX. PENAL CODE ANN. § 477 (Vernon 1952). The relevant section of the statute read as follows: "[W]hoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars." *Id.*

²⁶⁸ *Powell*, 392 U.S. at 534–35.

²⁶⁹ *Id.*

²⁷⁰ Justice Frankfurter did not participate in the decision. See *Robinson v. California*, 370 U.S. 660, 668 (1962).

²⁷¹ See *id.* at 671–78 (Douglas, J., concurring).

²⁷² See *id.* at 678–79 (Harlan, J., concurring).

²⁷³ See *id.* at 667–68.

²⁷⁴ Marshall had taken the seat of Justice Clark, one of the *Robinson* dissenters.

²⁷⁵ *Powell v. California*, 392 U.S. 514, 522–26 (1962).

²⁷⁶ *Id.* at 551–52 (White, J., concurring in result).

²⁷⁷ *Id.* at 553 (White, J., concurring in result).

²⁷⁸ Justices Douglas, Stewart, and Brennan joined the dissent.

²⁷⁹ *Powell*, 392 U.S. at 558–59 (Fortas, J., dissenting).

attributable to the disease or condition, he believed, should be regarded as an involuntary manifestation of that condition.²⁸⁰

The *Robinson* majority identified the problem with criminalizing addiction as one of attaching a moralistic stigma to a status or condition that is not chosen and for which the addict should not be held responsible.²⁸¹ No matter which model of addiction is chosen—some rational choice or moral responsibility model or the disease model—the defendant in *Robinson* does not deserve punishment because he has performed no act and so has done nothing to render him criminally accountable.²⁸² The infirmity manifested in the statute was that it punished “a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”²⁸³ The statute at issue in *Robinson* enables a majority to coalesce, not around a particular view of addiction (as culpable or not) or a particular view of the addict (as acting in a voluntary or involuntary manner) but around a view of criminal responsibility as requiring, at a minimum, the performance of a forbidden act or the non-performance of a required act.

The various theories of criminal justice discussed also turn on the criminal character of action or inaction. Crime control social norms theories and neutral and moral liberal versions of due process all depend upon the rational or moral choice to act or not; one is a law-abider or law-breaker, rule-follower or rule-breaker, or morally responsible or irresponsible being dependent upon how one acts in the relevant circumstances. For therapeutic penal welfarism, however (at least the disease model version of therapeutic jurisprudence), the issue is not that one has to act to be culpable but that, even if Robinson had acted, moral or rational choice categories of culpability are inappropriate. As an addict, Robinson requires therapeutic treatment, not moralistic punishment.²⁸⁴

The disease model fits uncomfortably within a traditional criminal discourse that measures responsibility on a volitional scale. Addiction could be considered as an increased susceptibility to, and diminished ability to resist, cravings to indulge in a particular substance. In that case, the addict could be characterized as volitionally choosing to engage in addictive behavior.²⁸⁵ To rebut the volitional approach, the disease model would have to show that addiction consists in more than a susceptibility to an intoxicant. Rather, the addict must experience a total

²⁸⁰ *Id.* at 554–70 (Fortas, J., dissenting).

²⁸¹ *Robinson v. California*, 370 U.S. 660, 667 (1962).

²⁸² *See, e.g., Morris*, *supra* note 245, at 24–26.

²⁸³ *Robinson*, 370 U.S. at 667.

²⁸⁴ This is the whole point of Justice Douglas’s concurrence. *See Robinson v. California*, 370 U.S. 660, 671–78 (1962) (Douglas, J., concurring).

²⁸⁵ This, in essence, is the claim made in Justice White’s concurrence in *Powell*. *See Powell v. Texas*, 392 U.S. 514, 551–54 (1968) (White, J., concurring in result).

inability to resist the substance-related cravings. Only then is the addict engaging in the behavior definitive of addiction rather than an expression of volitional choice.²⁸⁶ Thus, on the volitional model, our response to addiction is determined by the intensity of the craving combined with the ability to tolerate such cravings. As discussed, *supra*, the ability to tolerate the cravings may be considered more or less illusory dependant upon those social circumstances bolstering or diminishing that ability.²⁸⁷

In *Robinson*, Justice Stewart's majority opinion struggles to reconcile the disease model and the volitional approach. Justice Stewart uses traditional criminal categories of excuse and voluntariness of action as a framework in which to discuss the issue of responsibility and choice. Both of these categories fit squarely within the volitional approach. They therefore partake of crime-control or due process modes of justification and excuse. Excuse and voluntariness, insofar as they admit of degrees of culpability, sit uneasily within the penal-welfarist rhetoric of pathology and treatment.

For example, "attorney disbarred from the practice of law in the State of California" is a status. While the state may regulate the activities of disbarred attorneys from California *qua* disbarred attorneys from California (for example, by prohibiting their practicing law in another state), the state may not impose a criminal sanction upon them simply for having that status.

One way in which to read *Robinson* is therefore to suggest, as Justice Harlan does, that there is a due process limit upon the state's power to denominate certain acts as criminal. Criminalizing a pre-existing status is "an arbitrary imposition

²⁸⁶ This is the claim staked by Justice Fortas' dissent in *Powell*. See *id.* at 558 (Fortas, J., dissenting). Justice Fortas distinguishes between the "'social' drinker," among others, and the "'chronic alcoholic' who . . . cannot 'resist the constant, excessive consumption of alcohol.'" *Id.* For Fortas:

The sole question presented is whether a criminal penalty may be imposed upon a person suffering the disease of "chronic alcoholism" for a condition—being "in a state of intoxication" in public—which is a characteristic part of the pattern of his disease and which, the trial court found, was not the consequence of appellant's volition but of "a compulsion symptomatic of the disease of chronic alcoholism."

Id.

²⁸⁷ It is also worth noting that culpability is determined, not only by the intensity of the craving and the innate ability to tolerate or resist them, but also by the type of substance craved. While the failure to resist is usually somewhat blameworthy, our moral condemnation depends in part upon the social harms associated with the substance. For example, an individual may crave water or exercise. That individual may become somewhat bloated and spend more time than her compatriots in the restroom or the gym. Generally, however, we would see her craving as non-harmful and not worthy of censure, and perhaps even worthy of praise. Where the craving is for chocolate, tobacco, or alcohol, our awareness of the harmful effects on the individual and on society, through treating the diseases associated with over-consumption, generally encourages us to condemn a failure to resist the craving.

which exceeds the power that a State may exercise in enacting its criminal law.”²⁸⁸ The criminal law punishes acts, not propensities or desires,²⁸⁹ and even though such propensities may be a good indicator of future wrongful acts, the criminal law may not intervene until such a desire has been acted upon.²⁹⁰

Harlan’s concurrence constitutes a strong rejection of the penal-welfarist justification underlying the majority’s opinion on due process grounds. The criminal law generally does not punish individuals for simply having good or bad character: their ethical status is irrelevant, at least when determining whether they are guilty of an offense. Of course, the state can criminalize the acts that lead to disbarment. However, for example, Florida cannot then punish all disbarred attorneys from California who move into that state simply for having previously been disbarred in California and nothing more. Under *Robinson*, the California attorney would have to act, for example, by holding herself out as able to practice law.

Accordingly, under any of the crime-control models’ understanding of addiction, both Justice Douglas in *Robinson* and Justice Fortas in *Powell* are correct to insist that a person’s status or condition should not, of itself, incur the stigma of the criminal law.²⁹¹ The problem is that, under the crime-control or due process models of criminal justice, once the individual acts, she moves into the realm of moral choice and her status or condition provides a limited range of justifications or excuses for those acts. In the case of addiction, there is no claim that the drug addict’s ingestion of the addictive substance or the alcoholic’s appearance in public is justified: so long as these acts are voluntary, these are not blameless acts.²⁹² Rather, the claim made by proponents of the disease model of addiction is that the addict or alcoholic is to be excused because she is ill and should receive treatment. Whether the addict is only partially responsible or, in rare cases, completely non-responsible for his or her acts, the presence of some degree of pathology removes her totally from the sphere of moral condemnation and places her firmly within the therapeutic paradigm.²⁹³

²⁸⁸ *Robinson v. California*, 370 U.S. 660, 679 (1962) (Harlan, J., concurring).

²⁸⁹ *See id.* at 679 (Harlan, J., concurring).

²⁹⁰ The use of propensities to incapacitate criminals using civil commitment was declared constitutional in *Kansas v. Hendricks*, 521 U.S. 346 (1997); *see* Carol S. Steiker, *Supreme Court Review: Foreword: The Limits Of The Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 781–92 (1998).

²⁹¹ *Robinson*, 370 U.S. at 678 (Douglas, J., concurring); *Powell*, 392 U.S. at 567 (Fortas, J., dissenting).

²⁹² The whole thrust of insisting that the act is compelled or involuntary is to suggest that it is not really an act at all.

²⁹³ The claim is either that the addict acts without volition, under some form of duress, or involuntarily, as an automaton. The duress analogy has some proponents in the discussion of the intoxication defense. *See, e.g.,* Douglas N. Husak, *Addiction and Criminal Liability*, 18

Justice Douglas's opinion attempts to nullify the volitional argument by presenting the addict as lacking the requisite type of choice or control and so totally unable to resist her craving.²⁹⁴ He fully endorses a strong version of the medical model's characterization of addiction and addictive behavior as involuntary.²⁹⁵ He compares narcotic addiction to the early English treatment of the insane.²⁹⁶ Condemned by society as responsible for their condition, the insane were scourged to encourage them to regain their reason.²⁹⁷ Douglas's comparison is telling. Taken alongside Justice Stewart's suggestion that narcotics addiction is a disease like the common cold,²⁹⁸ it appears that punishing narcotic addicts for taking drugs is like punishing a flu-sufferer for sneezing—just as barbarous, in its way, as the sixteenth-century beatings.

It is not clear, however, except under the most unbridled versions of penal welfarism, that we always regard the ill or insane as blameless in the face of their disease. Generally, we hold individuals responsible for taking medication to meliorate their condition, especially when that condition has socially harmful results. The commonplace criminal law example is the epileptic car driver who fails to take his medication: he is responsible for any harm resulting from the involuntary acts that result. Put differently,

[T]he chronic alcoholic who proves his disease and a compulsion to drink is [not] shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who would be punished for driving a car but not for his disease.²⁹⁹

Accordingly, to resist this volitional challenge, Douglas must maintain a strong version of the disease model, one that comprehensively rejects the agent's ability to choose otherwise and responsibility when taking drugs.

Due process provides yet another way to reconcile the different modes of responsibility presented in *Robinson*. Like the disease model, due process reserves criminal condemnation for the culpable performance of certain acts rather than for certain types of individuals. Under due process, as under the

LAW & PHIL. 655 (1999). The idea that the addict is an automaton is the extreme form of the disease model.

²⁹⁴ See *Robinson v. California*, 370 U.S. 660, 676–77 (Douglas, J., concurring).

²⁹⁵ *Id.* at 671 (Douglas, J., concurring).

²⁹⁶ *Id.* at 668–69.

²⁹⁷ *Id.* at 668 (Douglas, J., concurring).

²⁹⁸ *Id.* at 667.

²⁹⁹ *Powell v. Texas*, 392 U.S. 514, 550 (1968) (White, J., concurring in result).

disease model, it does not matter that someone has a particular character or propensity or occupies a particular status. A person's character is, or should be, irrelevant for the criminal law. What matters is the manner in which they act.

Penal welfarism therefore fails to account for all the permissible responses to addictive behavior. Partial responsibility leaves us with the problem identified by Justice White in *Powell*: we may still wish to deter or punish the addict for her morally culpable choice.³⁰⁰ We could do so as a means of providing responsibility-maximizing reasons for avoiding consumption of the forbidden substance or for engaging in the prohibited behavior. Non-responsibility creates a different issue: the state may wish to prevent future re-offense by some form of therapeutic incapacitation.

Therapeutic incapacitation remains an option for both the therapeutic justice version of penal welfarism and for neutral liberal due process. Under both theories, the addict's limited or total incapacity to follow public norms cannot be morally blameworthy; some other response is required. For both therapeutic jurisprudence and neutral liberalism, treatment, not punishment, is the proper option.

Involuntary confinement as a therapeutic response places us in a quandary, however. As Justice Marshall indicates in *Powell*,³⁰¹ and Justice Black elaborates in concurrence,³⁰² short periods of punishment may be less invasive of liberty than long periods of incapacitating treatment. This is the paradox that faces liberals forced to choose between a penal-welfarist style of invasive diversion and an administrative, incapacitatory mode of punishment as the two current alternate approaches to drug treatment.

2. Confinement: Treatment or Punishment

There is a second debate staked out in *Robinson* and *Powell*, one that concerns the consequences of adopting a medico-legal response to the fact of addiction. If the disease model of addiction is correct, then at least some addicts are incapable of acting to control their craving. Their acts, when taken to satisfy the cravings, are involuntary or unwilling. These are the people who, though they should not be punished, require some form of social control to prevent them from coming into contact with the addictive substance. If addiction is not to be controlled using rational, responsibility-maximizing stimuli or some form of pharmacological or psychological treatment, then some form of liberty-constraining restraint would appear to be required. Only some more or less severe form of incapacitation will remove their ability to engage in addictive behavior.

³⁰⁰ *Id.* at 550 (White, J., concurring in result).

³⁰¹ *See id.* at 533.

³⁰² *See id.* at 539-41 (Black, J., concurring in result).

The issues then become: What are the permissible treatment options short of restraint and, if restraint is required, how severe should it be?

What is permissible would appear to depend first upon whether the addict's need for treatment is judged from the perspective of either the disease or volitional model. Under the disease model, where the addict is found to be unable to act so as to control her cravings,³⁰³ society may intercede and treat the addiction by some form of compulsory therapeutic response. Because the desire to ingest the addictive substance is not subject to control, some type of incapacitating confinement may be mandated. If there are no rational, psychological, or pharmacological means for so doing, then the individual must be removed from her proximity to the substance. For proponents of a strong disease model of addiction,³⁰⁴ or at least a model that considers the addict as acting in an involuntary manner,³⁰⁵ therapeutic involuntary confinement is the primary form of treatment program. Confinement may not be the first step in a compulsory-treatment program, but it will be an acceptable next step.³⁰⁶ Programs adopting a strong version of the disease model are structured around more or less coercive incapacitation or enforcement of abstinence.³⁰⁷

The volitional model, on the other hand, distinguishes between those who are able to resist their cravings to some extent or other and those who are not. As Justice Clark recognized in his dissent in *Robinson*, there is a difference between the "incipient, volitional" addict³⁰⁸ and those who have "lost the power of self-

³⁰³ This is the defect of will understanding of addiction. See *supra* note 236.

³⁰⁴ In other words, Justices Douglas and Fortas.

³⁰⁵ This would include Justice Stewart in his majority opinion in *Robinson v. California*, 370 U.S. 660, 667 (1962).

³⁰⁶ Justice Stewart suggests that:

In the interest of discouraging the violation of... laws [against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics], or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures.

Id. at 664–65. But note that under the strong disease model of addiction, penal sanctions are inappropriate, because nothing can deter the irrational and weak-willed behavior of the addict. See also FLA. STAT. ANN. §§ 397.675–397.6977 (West 2001) (setting forth involuntary confinement procedures as part of Florida's drug diversion statute).

³⁰⁷ Abstinence should really be understood as a form of incapacitation, as it removes the addict from the addictive stimulus, thus effectuating a limited form of incapacitation. Thus, alcoholics should avoid situations that would increase the likelihood that they would drink, and so avoid bars, cocktail parties, etc.

³⁰⁸ *Robinson*, 370 U.S. at 680 (Clark, J., dissenting).

control.”³⁰⁹ The incipient, moderately rational addict can respond to reason-affecting stimuli; the out-of-control addict can no longer do so.³¹⁰ This distinction is precisely the one that is resisted by proponents of a strong version of penal welfarism or the disease model of addiction. They attempt to establish that no addict should be subject to social stigma for engaging in acts definitive of her disease or condition.

Where some form of involuntary confinement is used to force the somewhat rational type of offender into treatment, however, the confinement itself does not function as treatment, unless as some form of drying out period;³¹¹ confinement treats only insofar as it removes the addict from the addictive substance. Where the addict is non-rational and unable to control her cravings, involuntary confinement may work as a form of treatment-through-incapacitation by removing the addict from the irresistible stimulus causing the addictive craving.³¹² The issue then becomes whether incarcerative incapacitation is the appropriate means for removing the temptation or whether some less restrictive form of treatment is appropriate. That will turn upon the rational capacity of the offender to resist cravings and the availability of other means of preventing the offender from giving in to the cravings. If there are less restrictive means, confinement ceases to serve a treatment purpose and becomes punitive.

There is a fine line between treatment and punishment, civil and criminal incapacitating responses. Although there are a variety of ways in which an individual may be subjected to involuntary confinement, and Justice Stewart appears to endorse some form of coerced treatment before resorting to involuntary confinement, nonetheless, the *Robinson* Court does not choose among them or provide any principled means (or even justification requiring us)

³⁰⁹ *Id.* at 681 (Clark, J., dissenting) (quoting CAL. WELF. & INST. CODE § 5350 (repealed 1965)).

³¹⁰ The gist of Justice Clark's dissent is that involuntary confinement and imprisonment are forms of liberty-denying incarceration; the criminal form is undertaken for treatment purposes so that an individual who has, in the past, manifested signs of narcotics addiction can be subjected to a ninety-day period of arrest and monitoring to confirm her status as an addict. *Id.* at 680–85 (Clark, J., dissenting). In this instance, what is offensive is not so much the criminal stigma associated with the arrest but detention without diagnosis. Put differently, under the California statute at issue in *Robinson*, a person who has been diagnosed as a narcotic addict is subjected to some form of preventative detention, whether for criminal or therapeutic purposes, without any required showing that she is currently an addict. CAL. HEALTH & SAFETY CODE § 11721 (repealed 1972). That, in itself, is both morally and ethically offensive, as well as violative of the United States Constitution's requirement that a deprivation of liberty may only be imposed after due process of law.

³¹¹ See *Powell v. Texas*, 392 U.S. 514, 528 (1968) (“It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides.”).

³¹² If the cravings cannot be controlled, then the means to satisfy them can.

to do so. Subsequent courts have developed three factors that appear decisive when policing this line. First, whether the individual does in fact suffer from a medically recognized disease. Relevant to this determination is whether there is broad medical consensus over the existence or definition of the disease or condition and the status within the medical profession of the scientific community claiming disease status for the condition.³¹³ Also relevant may be the addict's ability to choose to act so as to avoid the threatened restriction upon liberty—the greater the volitional aspect, the less likely it is that the condition requires treatment. The second factor is the process used to diagnose the disease. That process must be “neither arbitrary nor erroneous,”³¹⁴ and may not be taken by executive officials who are also involved in determining whether to punish the individual (although a judicial determination may not be required), but must be taken by a medical professional.³¹⁵ These are both potential due process constraints on penal welfarism. The third factor is the type and amount of incapacitation to be imposed, its intensity and duration.

We may be suspicious of the disease model on the grounds that it incompletely describes addiction or too quickly mandates therapeutic incapacitation of the incipient addict. The problem is one of how to determine the proper degree of incapacitation and surveillance for addicts. Those addicts for whom the medical model accurately describes their condition suffer from an irresistible biological propensity to satiate their craving. If they are to be treated, they must be removed from every opportunity to do so. For everyone else, the medical model incompletely describes the permissible range of responses. Either the biological propensity is resistible, and so the goal is to provide mechanisms by which to effectuate resistance, or the individual does not experience cravings at all, and so is not an addict.

The major task facing both proponents and critics of drug courts, then, is to match the range of potential responses to the various degrees of addiction. The penal-welfarist urge to treat pathological offenders has the potential, if unchecked,

³¹³ See, e.g., *Powell*, 392 U.S. at 522–26 (discussing lack of consensus in medical community over definition of disease of alcoholism, and the “unintelligible” distinctions between factors that determine whether the addict possesses or lacks the control definitive of the disease). Compare *In re Gault*, 387 U.S. 1, 15–19 (1967) (criticizing “arbitrar[y]” basis of “benevolent[]” determination of delinquency). “The idea of crime and punishment was to be abandoned. The child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive.” *Id.* at 15–16.

³¹⁴ *Washington v. Harper*, 494 U.S. 210, 228 (1990); see also *Gault*, 387 U.S. at 18–19; *Vitek v. Jones*, 445 U.S. 480, 492–93 (1980) (demonstrating the standard applied when determining whether to transfer the inmate from prison to mental hospital).

³¹⁵ See *Harper*, 494 U.S. at 231 (“Notwithstanding the risks that are involved, we conclude that an inmate’s interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge.”).

to turn into an administrative regime of incapacitation. When the offender is not an addict or has her addiction under sufficient control such that treatment is unnecessary, then treatment simply incapacitates rather than cures. The antidote is to determine which offenders need or respond to particular treatments and which do not or to abandon treatment altogether in favor of some retributivist form of punishment.

V. MATCHING OFFENDER TO TREATMENT

Offenders who enter drug court³¹⁶ have often learned a range of socially maladaptive behaviors designed to feed their habit no matter what the consequences for their relationships with others, including friends or family.³¹⁷ The range of treatment responses to these behaviors is highly varied and more or less eclectic, depending upon the treatment program. Depending upon the preferred criminal justice model, one may reject treatment as an inappropriate response to criminal conduct, require treatment as part of punishment so as to restore the offender to full moral status, require treatment to function as a form of choice-restructuring process, or regard treatment as the only means of staving off the otherwise unavoidable or irresistible addictive behavior.

In this section, I investigate some of the preconceptions surrounding the different treatment programs provided through drug courts. Generally, the assumption is that the worst that could be said about such treatments is that they are ineffective; but at their best they offer a road to a new and sober lifestyle. Instead of a means to a cure, however, I claim that drug treatment can function as a means of social control. This is especially the case with treatment that must be at least moderately incapacitative, directed at keeping the addict away from the addictive substance.

A. *Drug Courts and Treatment*

There are multiple therapeutic programs that can claim some success in treating addicts. Although some therapies are particularly successful with discrete addict types, for example, treatment communities with more youthful addicts, even they, like most other treatment providers:

³¹⁶ In this section, the references to drug court programs focus primarily on the Oakland, California and Miami, Florida drug courts (and California and Florida drug court statutes more generally), in large part because these are the two oldest programs in the nation.

³¹⁷ See, e.g., Sam Torres, Ph.D., & Robert M. Latta, *Training the Substance Abuse Specialist*, FED. PROBATION, Dec. 2000, at 52, 52 (emphasizing addicts' manipulative, game-playing behavior); Torres, *supra* note 83, at 20–21 (emphasizing the same).

Draw[] heavily from history and tradition, ... apply[ing] [a] ... blend of medical theory, moral instruction, and psycho-behavioral therapy in their attempts to rehabilitate drug offenders. ...

... [T]he addictions field wrestles with questions surrounding morality, personal accountability, and volition. ... [This leads to] a fragmented approach to status and conduct, rehabilitation and retribution, and, finally, compassion and punishment.³¹⁸

While many treatment providers insist that there is an important distinction between coerced and uncoerced treatment, that consensus is breaking down.³¹⁹ Currently, drug court practitioners prefer to relocate the distinction as one between incarcerative and non-incarcerative treatment regimes. Coercion, however, may not be the problem some critics imagine: generally, the choice is not between coercion and non-coercion but between differently coercive therapeutic regimes.³²⁰

As Timothy Edwards suggests, the major distinction is more one of when coercion occurs—at the outset, to force the offender into a treatment regime, or as part of the therapy itself: “In this regard [Edwards argues], a careful assessment of the relationship between compulsion and overall treatment efficacy must involve an acknowledgment that coercion is applied before *and* during treatment. There is a vast difference between being compelled into participating and being compelled into participating in a specific way.”³²¹ In drug court, therefore, the issue is not one of coercion versus non-coercion. Because the offender has volunteered to enter the drug court rehabilitation program,³²² issues of coercion during treatment predominate.

³¹⁸ Edwards, *supra* note 93, at 309–10.

³¹⁹ See, e.g., Larry O. Gostin, *Compulsory Treatment for Drug-dependent Persons: Justifications for a Public Health Approach to Drug Dependency*, 69 MILBANK Q. 561, 580 (1991) (“The intuition that compulsory treatment will fail because drug-dependent people must be self-motivated in order to benefit is simply not borne out by the relevant data.” (citations omitted)); see also Carlo C. DiClemente, *Motivation for Change: Implications for Substance Abuse Treatment*, 10 PSYCHOLOGICAL SCIENCE 209–13 (1999) (showing coerced treatment as effective as uncoerced).

³²⁰ Edwards, *supra* note 93, at 328–33.

³²¹ Edwards, *supra* note 93, at 334.

³²² See, e.g., CAL. PENAL CODE § 1000.1(b) (West 2004) (requiring offender’s consent to divert to drug court); *id.* at § 1000.2 (requiring court hearing to review offender’s consent to enter drug court); see also *People v. Reed*, 120 Cal. Rptr. 250 (Cal. App. 1975) (discussing consent requirement under California deferred entry or judgment diversion program); FLA. STAT. ANN. § 948.08(2) (West 2004) (requiring entry into drug program to be approved by “the administrator of the program and the consent of the victim, the state attorney, and the judge who presided at the initial appearance hearing of the offender”).

The decision to participate in a treatment regime may change after the original decision to enter. The addict may recognize that treatment is indeed beneficial and retrospectively, voluntarily endorse the coerced choice to enter by continuing to participate. Alternatively, the addict may drop out after having voluntarily entered the program. "The significant factor appears to be not the voluntary or mandatory nature of the treatment, but rather the characteristics of the treatment provided, whatever the impetus to seek care."³²³ For example, the high dropout rates for therapeutic communities provide some indication of the coercive nature of such regimes even when the addict volunteers for treatment.³²⁴

Furthermore, while there is evidence that some treatment is better than none,³²⁵ it appears that much more research is required to determine what aspects of rehabilitation are effective. Broadly, treatment may be separated into five different components: (1) the use of chemical or medicinal substances to treat addiction or its symptoms, (2) quarantine or incapacitation as a means of isolating the addict from the drug, (3) psychological or characterological initiatives to effect a change in the addictive personality, (4) the infliction of various sanctions and rewards to restructure the addict's ordering of preferences, and (5) the provision of education or vocational training to strengthen the addict's links to society.³²⁶ In detoxification, for example, the offender is isolated from the addictive substance and given some form of medicinal treatment to lessen the effects of withdrawal.³²⁷ Narcotics Anonymous self-help regimes are generally characterized by their blend of emotional or characterological suasion and support combined with an emphasis on abstinence as a style of quarantine, although such programs may provide some amount of drug education. Therapeutic communities impose extreme forms of incapacitation, psychological therapy, and sanctions, usually for extended periods of time.³²⁸

Drug courts claim to treat addicts primarily in two ways: first, by a style of courtroom practice that ensures offenders get with the program and, second, by matching addicts with treatment providers so that addicts receive an individualized assessment of their treatment needs and are directed to providers

³²³ David F. Chavkin, "For Their Own Good": *Civil Commitment of Alcohol and Drug-Dependent Pregnant Women*, 37 S.D. L. REV. 224, 248-49 (1991/92).

³²⁴ See generally, Edwards, *supra* note 93, at 319-20 (discussing high attrition rates in therapeutic communities).

³²⁵ Ethan G. Kalett, *Twelve Steps, You're Out (Of Prison): An Evaluation of "Anonymous Programs" as Alternative Sentences*, 48 HASTINGS L.J. 129, 139 (1996) ("[O]ffering some treatment is better than offering none at all, perhaps because it forces the substance abuser to acknowledge her problem at some level.").

³²⁶ See, e.g., Meyer & Lutes, *supra* note 87.

³²⁷ *Id.* at 662.

³²⁸ *Id.*

who are able to meet those needs.³²⁹ The treatment team's evaluation of the offender's needs may also be informed by the therapeutic judgments of the various treatment providers to whom the offender is referred.³³⁰ Both the process of in-court treatment and matching offender to treatment provider are conducted under the court's broad discretion. Thus, after the initial screening process dominated by the prosecutor's discretion and in which the court plays a reactive role, the subsequent determination of appropriate treatment places the court at the center of the decision-making process. The decision to match offender with treatment is at the heart of the experimentalist approach championed by Michael C. Dorf and Charles F. Sabel.³³¹

B. Drug Courts Screening Procedures

All drug courts use some form of screening procedure to weed out classes of offenders as unsuitable and ineligible for the rehabilitation program. Different courts, therefore, use different screening criteria to obtain the type of offenders that they wish to treat.³³² Most courts, however, screen out offenders with a history of violent crime; many screen out offenders who have engaged in drug dealing rather than drug use.³³³ Both these criteria generally respond to the crime-control demand that only offenders who do not pose a threat to the community should be diverted from prison. Where treatment is available in jail or prison, such a screening process may not prejudice the therapeutic needs of real addicts who need treatment but do not fit these criteria—they can receive treatment in a more secure setting. These generally accepted criteria suggest, however, that need for treatment may not be the prime determinant of who gets into drug court: they are to be balanced, in the first instance, against incapacitatory goals.

There are generally two opportunities to engage in screening: when the prosecutor decides to refer an offender to drug court, which may happen pre- or

³²⁹ See, e.g., Hora et al., *supra* note 8,

³³⁰ Natasha H. Williams, *The Adult Drug Court Model: The Effect of Structural Differences on Program Retention Rates* (February 2003) (unpublished manuscript, on file with author).

³³¹ See Dorf & Sabel, *supra* note 31.

³³² See, e.g., *People v. Barrajas*, 73 Cal. Rptr. 2d 123, 124 (Cal. App. 1998) (discussing criteria for diversion under CAL. PENAL CODE §§ 1000–1000.5 (West 2004)); *People v. Esparza*, 132 Cal. Rptr. 2d 377, 380–82 (Cal. App. 2003) (discussing application of the Substance Abuse and Crime Prevention Act of 2000, codified in CAL. PENAL CODE §§ 1210, 1210.1, 3063.1, and CAL. HEALTH & SAFETY CODE § 11,999.4 (West 2004)); see also FLA. STAT. ANN. 11 J. Cir. § 97-15, Appendix A (detailing Miami-Dade County Drug Court regulations).

³³³ See Hora et al., *supra* note 8, at 507–80.

post-plea bargain, depending on the drug court,³³⁴ and when determining which treatment program is suitable for the offender.³³⁵ In most jurisdictions, the district attorney prosecuting the case makes the initial determination to divert defendants to the drug court program. At this stage, the procedure fits strongly within the crime-control model, and drug courts do not interfere with the large discretion enjoyed by the prosecutor at the charging state of proceedings. The prosecutor exercises the sole power to recommend that a defendant be diverted to drug court, subject to statutory constraints.³³⁶ If the prosecutor decides that the criteria do not apply, the defendant has no further recourse and must proceed through the criminal justice system in the normal manner.³³⁷

³³⁴ Drug courts channel offenders into treatment at a variety of different stages of the criminal justice process. There are, however, two general channeling policies: deferred prosecution and post-adjudication diversion. Deferred prosecution drug courts require that the defendant waive her right to a speedy trial and enter treatment as soon as possible after being charged. *See* Murphy, *supra* note 4, at 476; Boldt, *supra* note 13, at 1255. Both the Miami and Oakland courts are deferred prosecution drug courts. Under the post-adjudication model, the defendant is, in fact, convicted, either after trial or after a plea bargain. In that event, an incarcerative sentence is deferred pending completion of a drug treatment program. *See* Murphy, *supra* note 4, at 476. Currently, thirty percent of drug courts divert offenders at the pre-trial stage and before a plea agreement ("pretrial/pre-plea"); sixteen percent are pre-trial and post-plea; twelve percent are post-conviction sentencing institutions; and the rest, forty-two percent, are some combination of the above. NOLAN, *supra* note 3, at 41.

³³⁵ *See, e.g.*, FLA. STAT. ANN. § 397.705(2) (West 2004) (permitting director of rehabilitation program to refuse entry to offenders).

³³⁶ *See, e.g.*, *People v. Covarrubias*, 22 Cal. Rptr. 2d 475, 477 (Cal. App. 1993).

The district attorney, pursuant to the separation of powers principle of our state constitution "... ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." The prosecutor has [a] dual role. He or she is the defendant's adversary but at the same time, is the "... guardian of the defendant's constitutional rights. ..."

Id. (citations omitted). *See also* *People v. Sturiale*, 98 Cal. Rptr. 2d 865, 867 (Cal. App. 2000) (showing when a prosecutor determines diversion); *State v. Upshaw*, 648 So. 2d 851, 852 (Fla. App. 1995) (demonstrating that a state attorney has sole discretion to prosecute).

³³⁷ *See* CAL. PENAL CODE § 1000(b) ("The sole remedy of a defendant who is found ineligible for deferred entry of judgment is a post-conviction appeal."). A California court has held:

Because the district attorney's preliminary screening does not involve the court, it is not a judicial act. ... [T]he trial court has no power to conduct a judicial review of the determination. ... [and has] no power to overrule the district attorney's determination that [the defendant] was ineligible for a deferred entry of judgment.

Sturiale, 98 Cal. Rptr. 2d at 868; *see also* *People v. Paz*, 266 Cal. Rptr. 468, 472 (Cal. App. 1990) ("If the district attorney, upon reviewing the available records, determines that a defendant has a prior conviction for an offense involving a controlled substance, the defendant's exclusion from the diversion program is automatic.").

The statutory criteria that form the basis for the prosecutor's decision to offer the option of referral to drug court do not depend upon determining that the offender is in fact an addict, as opposed to a possessor, user, or solicitor of drugs. Furthermore, there are good reasons for non-addicts to wish to enter the program: in California, successful completion of the process not only results in the pending criminal charges being dismissed,³³⁸ but also, if the defendant successfully completes the post-plea program, "the arrest upon which the judgment was deferred shall be deemed to have never occurred."³³⁹ The same is true of the Florida program.³⁴⁰ Accordingly, depending upon the diversion statute, when the offender graduates from drug court, he or she can deny that she was charged at all.

Like the court, the drug court treatment provider also has an opportunity to screen out a limited range of ineligible defendants.³⁴¹ The limitations placed upon the screening process make explicit some of the values underlying both the drug court itself and the treatment to be provided. For example, if the goal of treatment is to cure addicted offenders, the treatment provider should have the opportunity to screen out non-addicts or addicts who do not respond to the treatment provided. Generally, however, the screening decision is limited by a variety of factors that

Upon the prosecutor's recommendation for diversion, however, the court arranges a hearing at the defendant's arraignment to determine whether it should endorse or reject the district attorney's recommendation to divert the defendant to drug court. *See* CAL. PENAL CODE § 1000(b); *see also id.* § 1000.3. In California, if the defendant is eligible for diversion, the drug court conducts the diversion referral and plea or waiver hearing. Hora et al., *supra* note 8, at 491. In the Oakland F.I.R.S.T. program, the court does so at the time of arraignment, and the defendant proceeds immediately from the hearing, walking five minutes up the street to the probation office, to enter rehabilitation. *Id.* at 473–74. Such a hearing is required only where there is a dispute over the facts surrounding the diversion recommendation; absent a factual dispute, "[n]o hearing is necessary." *Paz*, 266 Cal. Rptr. at 472. At the initial screening, therefore, drug courts respond to the administrative concerns of the prosecutor: with the exception of statutes like the SACPA, the initial decision to send offenders to drug court rests with the prosecutor. Every other decision at the screening stage is a response to her decision to refer. Even under the SACPA, the prosecutor enjoys wide discretion over charging crimes. Thus, if the prosecutor is able to obtain a felony conviction on a non-drug offense, the offender will be completely precluded from drug court under the SACPA.

³³⁸ CAL. PENAL CODE § 1000.3 (West 2004).

³³⁹ *Id.* § 1000.4(a). ("The defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or granted deferred entry of judgment for the offense . . .")

³⁴⁰ FLA. STAT. ANN. § 948.08(6)(c)(2) (West 2004) (requiring dismissal of charges on successful completion of program); Upshaw, 648 So. 2d at 852–53 (dismissing charges after completion of program despite State's belated claim that Upshaw was ineligible for diversion).

³⁴¹ *See, e.g.,* FLA. STAT. ANN. §§ 397.705(2)(b), (c) (permitting director of treatment facility to refuse to admit offender or discharge offender where offender is beyond the safe management of the treatment facility).

include the statutory regulations and legal decisions elaborating the purpose and procedures to inform screening. Accordingly, the treatment providers' evaluations of individual offenders may have to accommodate the manner in which a particular court or legislature understands the conception of addiction and the range of appropriate treatments, as well as a prosecutor's decision to screen in non-addicts or the mildly addicted. These legal influences may severely circumscribe the treatment providers' ability to refuse treatment to those they do not consider addicts.

There are, however, certain incentives for treatment programs to take non-addicts.³⁴² The program completion rate of the non-addict is likely to be higher than the addict. The non-addict is less prone to relapse, and recidivism is likely to be reduced as the non-addict is better able to adapt to the abstinence generally required by drug court.³⁴³ These front end issues—the impact on completion and recidivism rates of addicts as compared to non-addicts—have not been addressed in the sociological studies of drug courts, yet are vital to understanding the claim that drug courts work.³⁴⁴

1. *Coercion and Treatment*

To perform this highly useful allocation of treatment to the offender, the drug court must be able to review, evaluate, and coordinate the different available treatment options. Usually, the probation department's pre-sentence report provides the necessary information,³⁴⁵ although it is unclear how much

³⁴² See, e.g., STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION 53 (1985).

³⁴³ In both California and Florida, non-addiction is no bar to entry into drug court programs. See *Smith v. Florida*, 840 So. 2d 404, 405, 406 n.1 (Fla. App. 2003) (holding that where the defendant was determined not to be an addict by the treatment provider, she would nonetheless have had to undergo treatment had she signed a drug court agreement during the plea colloquy); see also *People v. Esparza*, 132 Cal. Rptr. 2d 377, 380 (Cal. App. 2003) (finding defendant's claim that he was not an addict not a decisive factor in determining eligibility for California drug court program).

³⁴⁴ There is no evidence that drug courts monitor the degree of addiction of those who enter drug courts. Drug courts have a strong disincentive from doing so: the program is supposed to be therapeutic, and the therapeutic rationale disappears when the offenders are not addicts.

³⁴⁵ Meyer & Lutes, *supra* note 87, at 657 (noting that courts require pre-sentence report to be prepared whenever there is a felony conviction or the court orders a report consequent to a misdemeanor conviction); see also Torres, *supra* note 83, at 18.

[T]he medical model begins with an *examination*, which is conducted during the preparation of the presentence investigation (PSI) report. The diagnosis also may be contained in the PSI, but it may be scrutinized more closely during the prison classification process or by the supervising probation officer before or after the initial interview. Once the examination and diagnosis have been completed, a *treatment plan* is developed either

information is routinely available at the arraignment hearing, which is when offenders are diverted under the Oakland model.³⁴⁶

It is at this point that the difference between the social norms version of crime control and the therapeutic jurisprudence version of penal welfarism is at its most apparent. For therapeutic jurisprudence, the goal is to match the offender to the appropriate treatment given the available treatment options. Under the therapeutic model, treatment occurs in two locations: the courtroom and the clinic. Therapeutic jurisprudence, as adopted by drug court judges, constitutes as the primary therapeutic relationship that between judge and offender. In many courts, the judge meets with the treatment providers prior to the court session. Once in the courtroom, it is the judge that controls the therapeutic interaction. The purpose of the treatment provided is to ensure that the offender internalizes a set of attitudes to drugs and her status as an addict.³⁴⁷

Internalization is content-dependent. It matters, under the therapeutic model, what norms the offender accepts and why she accepts them. That is the whole point of “getting with the program” and “telling the right story.”³⁴⁸ In order to ensure that drug court offenders internalize the proper therapeutic understanding of their condition, they are “pressure[d] . . . to tell . . . stor[ies] about themselves according to the treatment paradigm.”³⁴⁹

The social norms version of crime control takes a radically different approach to the provision of treatment. As we have seen, the social norms theorists are somewhat wary of the drug court’s innovative courtroom procedures, preferring to characterize drug court as a form of probation. The demotion of courtroom practice as a central feature of the drug court’s practice is made possible by two other features of the social norms theory: the fact that social norms need only be accepted, rather than internalized, and the potential for drug courts to function as an experimentalist institution.

I have already provided a brief account of “acceptance” in the context of neutral liberal justifications for punishment. Richard McAdams argues that peer pressure—what he calls “esteem”—functions to regulate behavior by providing a process for enforcing social norms.³⁵⁰ Individuals wish to attract the endorsement of their peers and avoid their censure; accordingly, they tend to adopt norms that,

by the institution or by the probation officer responsible for supervision. When the treatment plan is developed, a prognosis is made regarding *relapse*, or the probability of recidivism.

Id.

³⁴⁶ “To have the greatest chance of success, courts must . . . [perform] an initial screening . . . soon after arrest.” Brown, *supra* note 86, at 87–88.

³⁴⁷ McAdams, *supra* note 186, at 376–86 (discussing internalization of norms).

³⁴⁸ See NOLAN, *supra* note 3, at 123–26.

³⁴⁹ *Id.* at 126.

³⁵⁰ See McAdams, *supra* note 186, at 367–76.

for whatever reason, their peers endorse and avoid those they censure.³⁵¹ The conforming agent need not have any opinion as to why certain norms are favored or disfavored and need not adopt the beliefs of the peers whose norms she adopts. All that matters is that her behavior in fact conforms to that stipulated by the informal social norms.³⁵²

Experimentalism provides an independent ground for approving drug courts. The experimentalist vision for drug courts depends upon characterizing them as more like an administrative institution than a court. Although such a characterization is, as I have suggested, flawed, experimentalism nonetheless provides an important and attractive rationale for drug courts. Dorf and Sabel suggest that drug courts are unique because, in addition to the treatment team, a variety of affected communities, including probation officers, service providers, and the addicts themselves, provide feedback on the efficacy of particular treatments for particular addicts.³⁵³ These different sources of feedback permit the court to distinguish which types of rehabilitation are most effective for particular types of addicts and which treatment providers are best at administering those treatment regimes. While acknowledging that, as yet, there are significant lacunae in the information available to the drug court judge, nonetheless, Dorf and Sabel believe more effective information gathering will overcome these problems.

If Dorf and Sabel are correct, then drug courts represent a significant improvement on most treatment provided through probation or parole,³⁵⁴ particularly because drug courts specialize in addiction.³⁵⁵ Probation and parole, which are the traditional non-custodial options, are often regarded as insufficiently well-structured to perform the task of supervising an offender in a treatment program and imposing the graduated sanctions necessary to retain the offender within the treatment program, although there are a variety of options, such as intensive supervision probation and specialized drug treatment programs,

³⁵¹ See *id.* at 367–76; see also Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997)

[A] person's beliefs about whether other persons in her situation are [engaging in law-abiding behavior] plays a much more significant role in her decision to comply [with legal norms] than does the . . . expected punishment for evasion. Likewise, the perception that one's peers will or will not disapprove exerts a much stronger influence than does the threat of a formal sanction on whether a person decides to engage in a range of common offenses—from larceny, to burglary, to drug use.”

Id.

³⁵² See McAdams, *supra* note 186, at 367–76.

³⁵³ See Dorf & Sabel, *supra* note 31, at 841–52.

³⁵⁴ See, e.g., Cooper, *supra* note 91, at 22.

³⁵⁵ See Torres & Latta, *supra* note 317, at 52–53 (discussing creation of training process specifically designed to address substance abuse).

that attempt to ensure that offenders obtain some form of treatment.³⁵⁶ In the civil commitment context, previous attempts to match offenders to treatment had mixed success, largely dependent, it appears, on the quality of treatment and the efficacy of the allocation of treatment to offender.³⁵⁷

Drug courts may, however, present some institutional impediments to the proper functioning of the Dorf and Sabel model. For example, while there is some evidence that the diagnostic information required to fit treatment to offender is readily available,³⁵⁸ it is not clear that drug courts are able to take full advantage of that information. First, treatment options may be constrained by the range of providers affiliated with a particular court program.³⁵⁹ Second, space in treatment programs is limited and so offenders are likely to be referred to programs based upon the availability as well as the propriety of the particular treatment regime.³⁶⁰ “In these instances, it is unlikely that treatment referrals will be made based solely on decisions regarding individual diagnosis and appropriateness of a given treatment modality; rather, the individual offender frequently will be referred to that provider with whom the treatment court has reserved beds.”³⁶¹

A second complicating factor is that treatment providers may compete for those offenders least likely to disrupt the treatment program or most likely to succeed regardless of the rehabilitative regime.³⁶² The criteria for measuring efficacy must therefore include some evaluation of the addict’s amenability to treatment that is independent of the treatment provider. That evaluation may be complicated by the manner in which a particular court endorses the disease model of addiction: under a strong version of the medical model, all addicts exhibit the same pathology. The court’s ability to distinguish or interest in establishing the addict’s susceptibility to cravings based on prior history may be limited: under the medical model, even one exposure to the addictive substance indicates the potential for a lifetime of serious drug dependency.

Furthermore, feedback from the larger community of drug offenders, which potentially includes non-addicts, addicts, and the friends and families of these

³⁵⁶ See, e.g., Meyer & Lutes, *supra* note 87, at 658.

³⁵⁷ See, e.g., Sana Loue, *The Criminalization of the Addictions: Toward a Unified Approach*, 24 J. MED. & L. 281, 317–320 (2003) (discussing California and New York experiments with involuntary commitment for drug offenses); Chavkin, *supra* note 323, at 236–39 (discussing same).

³⁵⁸ See Boldt, *supra* note 13, at 1226–27 (discussing availability of information on efficacy of different treatment modalities for different types of addicts).

³⁵⁹ For example, my local drug court, the Hampden County Juvenile Drug Court, located in Springfield, Massachusetts uses only one treatment provider. See Hampden County Juvenile Drug Court Policy and Procedures Manual (on file with author).

³⁶⁰ See *id.* at 1228.

³⁶¹ *Id.*

³⁶² See, e.g., Cohen, *supra* note 342, at 53.

offenders, may be tainted by self-interest.³⁶³ Non-addicted offenders may enter the system on the understanding that the charge will be dismissed on completion. These offenders are not concerned with whether treatment works but how onerous the program is.³⁶⁴ For the addict community, assuming that the addict population of a particular jurisdiction is relatively cohesive and shares information among its members in a relatively efficient way,³⁶⁵ that community may be more interested in staying addicted than becoming cured. Accordingly, the addict community may evaluate treatment on their ability to work the system rather than their ability to work a cure.³⁶⁶ Moreover, as Dorf and Sabel acknowledge, other factors, such as family disputes, can affect referrals to particular institutions.³⁶⁷

Under the social norms version of crime control, neither of these issues is terribly problematic. On the one hand, social norms theorists are simply not interested in degenerate social norms.³⁶⁸ The values of law breakers just do not count.³⁶⁹ The point of treatment is to require offenders to accept law-abiding norms and while community feedback is important, the legislature is the proper arbiter of those norms and the court is charged with reinforcing them. On the other hand, referral consequent to family disputes may serve to accomplish the process of norm-reinforcement. So long as the spouse, sibling, child, or other peer endorses law-abiding norms, their reason for doing so is irrelevant. Furthermore, by supporting such norms, the court can ensure their transmission into the community.

Finally, even if experimentalist feedback does identify the best treatment programs and providers for each type of offender, we are back to the problem of supply and demand: it is by no means clear that there will be enough providers supplying effective treatment to accommodate all the offenders that require the treatment. There is, however, a paucity of information currently available to determine whether drug courts are performing their allocative function efficiently. The lack of information may be caused by a more general conceptual confusion of or complacency over who is an addict and who is not and what counts as

³⁶³ See, e.g., *Cole v. State*, 714 So. 2d 479, 485 (Fla. App. 1998) (involving a wife who filed involuntary commitment petition because husband's "personality chang[ed] from loving to mean and vicious"). The court of appeals voided the petition and granted a writ of prohibition on a contempt of court charge due to severe improprieties in filing the petition. *Id.* at 492.

³⁶⁴ See, e.g., *Smith v. State*, 840 So. 2d 404 (Ct. App. Fla. 2003). The defendant withdrew from drug court once she realized how onerous the drug court procedures would be. *Id.* at 405.

³⁶⁵ Torres, *supra* note 83, at 20.

³⁶⁶ *Id.*

³⁶⁷ Dorf & Sabel, *supra* note 31, at 871–72.

³⁶⁸ Simon, *supra* note 146, at 48–74.

³⁶⁹ Simon calls this the "citizen perspective" in contrast to the "victim perspective" held by liberal legalism. *Id.* at 48–49.

treatment and what does not, as well as the inherent difficulty in studying the courts' consistency in applying allocative criteria to the various offenders passing through their courts. Of course, addiction matters more, at least in theory, for the therapeutic version of penal welfarism than for the social norms theory of crime control; for social norms theorists, the point is simply to reach law-breakers rather than addicts. Nonetheless, if the experimentalist justification is to predominate and drug courts are to function so as to efficiently match treatment to offender, then the necessity of better systems for gathering and sharing information about treatments and providers amongst members of the treatment team and ultimately amongst the various drug courts is obvious.

2. *Treatment and Incapacitation*

The efficacy of allocation of offender to treatment regime is relevant, however, only on the assumption that treatment is the central goal of the drug court. If incapacitation is the central purpose, for example, then no matter how bad the treatment offered, so long as it fulfils the goals of detention and surveillance, it will fit the requirements of incapacitation. Of course, multiple purposes may compete within the same drug court: it may engage in a degree of incapacitation as well as treatment. Furthermore, as Boldt demonstrates, the drug court's failure to provide adequate treatment may result from inadequate resources or treatment options rather than the adoption of a particular penal philosophy.³⁷⁰ If the claim, however, is that drug courts treat offenders, then drug court advocates must address the issue of over- and under-inclusiveness: whether drug courts operate to screen out offenders who require treatment and screen in those who do not.

Under the moral liberal version of due process, volitional accounts of addiction support the retributivist desire to respect the offender's moral agency through punishment. Punishment may be modified by various excuses, some of which will depend upon the offender's lowered capacity to act rationally or responsibly. Where the offender lacks any moral or rational capacity, punishment is inappropriate. Treatment, therefore, works in conjunction with punishment to restore the offender to full capacity. Treatment, however, is never required as a condition of punishment but may be offered in addition to it.

Accordingly, where the addict is more or less rational, some form of compelled treatment program is certainly justified, under the social norms version of crime control, to manipulate the rational ordering of the available choices so as to encourage participation in treatment or to reinforce socially acceptable choice. When the available options have been re-ordered to ensure that the social harm—choosing to satisfy one's addiction—is placed significantly lower on the scale of rational orderings and yet, despite the re-ordered interests, the addict still chooses

³⁷⁰ See Boldt, *supra* note 13, at 1228.

the social harm, then punishment is not only justified but required under both the social norms version of crime control and due process models of addiction.³⁷¹

Confinement, as a method of or pre-requisite for treatment, is offensive only to the moral liberal due process model. Moral liberalism requires that the punishment be limited to that degree sufficient to respect the offender's moral autonomy; where confinement lasts longer than morally appropriate, then treatment itself is inappropriate. Social norms theorists need not adopt this approach; so long as treatment is effective in reshaping the offender's behavior and re-enforcing norms of law-abidingness, then continued treatment could be justified. Under the therapeutic jurisprudence model employed by drug courts, treatment is always mandated. The offender, as addict, is perpetually on the brink of relapse; the question is not whether to treat, but what degree of treatment to impose on a given occasion. With its emphasis on isolation from addictive stimuli, the drug court version of therapeutic jurisprudence retains confinement as a significant option.

So far, however, we have considered confinement when used in a manner disproportionate to the treatment required; detention may also be offensive when disproportionate to the harm posed. The therapeutic justification for involuntary confinement depends upon removing the addict from access to the stimulus. A harm-focused justification for imposing different levels of incapacitation would, however, depend, in part, upon the consequences of relapse. If the social harm consequent to relapse is slight, then the justification for engaging in severely incapacitating confinement is lessened. Accordingly, the drastic treatment response of involuntary confinement must be managed in a manner that minimizes impinging upon the addict's liberty rights. Otherwise therapeutic incapacitation risks treating addicts on the basis of a status or condition they are powerless to change and imposes an extremely onerous constraint on their liberty rights without considering alternatives which, though they may be more costly for society, need not be more costly to manage in terms of posing a danger to society.

Courts often apply due process considerations, recognizing that there is a qualitative difference between treatment and punishment,³⁷² in part dependent

³⁷¹ Failure to punish would undermine the re-ordering of the interests. If there was no punishment following discovery of the social harm, there would be no reason to threaten punishment.

³⁷² "Forced administration of antipsychotic medication may not be used as a form of punishment." *Washington v. Harper*, 494 U.S. 210, 241 (1990) (Stephens, J., concurring); see also *Vitek v. Jones*, 445 U.S. 480, 493-94 (1980).

None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime. Our cases recognize as much and reflect an understanding that involuntary commitment to a mental hospital is not within the range of

upon the effect that each is supposed to have upon the individual. In at least the retributivist versions of punishment, confinement and coercion are ends in themselves, designed to mete out to the criminal the degree of harm she has visited upon society. Punishment is therefore limited in both duration and type.³⁷³ Put differently, retributivist theories of punishment place substantive limits on the type of behavior that may be punished.³⁷⁴ Only behavior that manifests the relevant quantity and quality of social harm should be subjected to punishment.

Neutral liberal justifications of incapacitation may also be limited. Neutral liberalism, it should be remembered, uses some form of participative process to determine public values; that process is conducted from a position of ignorance about the beliefs one will ultimately adopt and the social status one will ultimately enjoy.³⁷⁵ Accordingly, when determining the appropriate punishment for a given social harm, neutral liberalism focuses primarily on deterrence and rehabilitation rather than the morally loaded position of retributivism.³⁷⁶

From a neutral liberalist perspective, the substantive limits on punishment are determined not by the content of some moral theory but by the proper process of rule-enactment.³⁷⁷ One is punished for one's failure to follow socially agreed-upon norms and the quantity and quality of punishment is in turn determined by a set of socially agreed-upon norms. This does not mean, however, that there are no limits upon punishment. For example, deterrence goals take at least two general forms: individual and social.³⁷⁸ Where deterrence is also directed towards the particular circumstances of the individual, the goals of punishment are to avoid

conditions of confinement to which a prison sentence subjects an individual. A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.

Id.; *Harper*, 494 U.S. at 221–22.

³⁷³ Limitation by type is generally at issue where due process is a consideration affecting punishment. The law recognizes that there must be some "concept[] of dignity, civilized standards, humanity, and decency" that places a limit on punishment. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). Accordingly, the Supreme Court has prohibited punishments that involve the "unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Similarly, force may not be used as a means of penal control "maliciously and sadistically for the very purpose of causing harm." *Id.* at 320–21; *see also Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992). And, prison conditions, though uncomfortable, may not be inhumane. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

³⁷⁴ *See, e.g., Hart, supra* note 165.

³⁷⁵ *See, e.g., Dolovich, supra* note 166, at 316–46.

³⁷⁶ Hampton, *Liberalism, supra* note 163, at 170–76.

³⁷⁷ *Id.*

³⁷⁸ *See, e.g., Dolovich, supra* note 166, at 383.

inflicting unnecessary harm upon the individual and ultimately to benefit her and society.³⁷⁹ Individual deterrence in this form is compatible with treatment or rehabilitation: both are directed towards the welfare of the individual offender. Individual deterrence and rehabilitation, therefore, require choosing the least restrictive means to effectuate their goals. Where incapacitation goes beyond the least restrictive means or utilizes burdensome restrictions not necessary to the treatment program, the treatment process may be transformed into a punitive one.³⁸⁰

From the perspective of social utility, incapacitation has its limits as a utilitarian justification: as with all utilitarian balances of benefit and harm, where the individual's liberty interest outweighs the harm to society that justifies incapacitation, then the individual should be released. The difficulty comes when the symptoms of the disease are a criminally proscribed social harm and the treatment is incapacitation through confinement. In this case, both criminal sanction and treatment share similar goals. In the case of criminal sanction, however, the due process liberty interest is subject to administrative penological considerations.³⁸¹ Furthermore, a diverse series of punitive options that are more

³⁷⁹ *Id.* at 379–85.

³⁸⁰ Such considerations were at issue in two cases, *Powell* and *Gault*, in which Justice Fortas appears to take divergent positions regarding the amount of deference due to the expert determination that the defendant is suffering from a disease or condition. In *Powell*, Justice Fortas appeared to endorse the determination that alcoholism was a medical “condition he is powerless to change,” and so defer to an expert’s determination of the issue, the result of which could be a long period of involuntary confinement in a civil institution. *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting). In *Gault*, Justice Fortas was much less willing to defer to the expert determination about such a condition and instead suggested that “[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court.” *In re Gault*, 387 U.S. 1, 28 (1967). Justice Stewart, on the other hand, accepted the expert designation of narcotic addiction and delinquency as conditions in both *Robinson v. California*, 370 U.S. 660, 667 (1962), and *Gault*.

Whether treating with a delinquent child, a neglected child, a defective child, or a dependent child, a juvenile proceeding’s whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.

Gault, 387 U.S. at 78–79 (Stewart, J., dissenting).

The difference between Justice Fortas’ opinions in *Gault* and in *Powell*, then, resides in the types of attributes he identifies as a condition, and, therefore, as a medical decision immune from due process considerations. The issue then becomes one of what sort of process is required before a court will accept that the individual suffers from a condition. That in turn may depend upon whether the condition is a medically-recognized one. *See Powell*, 392 U.S. at 533; *see also Washington v. Harper*, 494 U.S. 210, 231 (1990).

³⁸¹ *See, e.g., Turner v. Safley*, 482 U.S. 78 (1987) (showing prison regulations valid so long as furthering penological goals).

or less restrictive are permissible to effectuate the goals of deterrence and retribution. Nonetheless—and this is the insight of Justices Marshall and Black in *Powell*—the inherent retributivist limitations on punishment (the requirement of some form of proportionality) may render even punishment that has incapacitation as its primary goal less constricting of liberty than therapeutic confinement.³⁸² In the therapeutic sphere, when the treatment itself is abstinence or incapacitation, there is no upper limit on the time spent in an institution to effect a cure.³⁸³

Furthermore, under a neutral liberal justification of incapacitation the major determinant in the balance between individual liberty and the protection of society will be determined by the particular justification of punishment which attempts to balance the conflicting interests of an individualized estimation of the harm presented by that type of behavior and the ability to police such addicts. This calculation may well be an economic one: the financial cost of permitting the offender-patient to roam free without adequate—meaning round-the-clock—supervision is too costly.³⁸⁴

VI. DO DRUG COURTS DIVERT OFFENDERS FROM PRISON?

Even if drug courts properly engage in some form of treatment-based incapacitation, the diversion claim suggests they receive less time in prison under the drug court model than the offender would otherwise receive. In this section, I provide a brief assessment of the drug court's claim to divert offenders from prison.

A. *Drug Courts and Diversion*

Stanley Cohen provided an early and prescient description of the difference between various types of diversion and the manner in which therapeutic diversion operates to channel offenders into rather than out of the criminal justice system.³⁸⁵ Traditional or true diversion provides the police with a binary choice: either screen the offender out of the system or send them on a course that leads to

³⁸² See, e.g., MORRIS, *Persons*, *supra* note 165, at 31–57 (1979); Lewis, *supra* note 165, at 301–08; Hart, *supra* note 165, at 410.

³⁸³ This point is a staple of retributivist theories of punishment. See, e.g., Lewis, *supra* note 165, at 301–08 (rejecting treatment model of punishment in favor of moral one that respects moral personhood of offender).

³⁸⁴ See, e.g., Douglas Husak, *Holistic Retributivism*, 88 CAL. L. REV. 991, 996–97 (2000) (emphasizing importance of economic cost to calculus of punishment).

³⁸⁵ STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION* 41–54 (1985).

court and prison.³⁸⁶ At each stage of the criminal justice process, where the offender is not processed “up” she is processed “out.”³⁸⁷ The new form of diversion, centered as it is around private, non-punitive therapeutic mechanisms of social control, provides a third option: channeling away from court but into a therapeutic system of social control.³⁸⁸

Cohen uses the metaphor of a fishing net to describe how the new systems of therapeutic “deviancy control” work, with the therapeutic institutions as the net and potential offenders as the fish.³⁸⁹ According to Cohen, under the therapeutic system of diversion:

- (1) there is an increase in the total number of deviants getting into the system in the first place and many of these are new deviants who would not have been processed previously (wider nets);
- (2) there is an increase in the overall intensity of intervention, with old and new deviants being subject to levels of intervention (including traditional institutionalization) which they might not have previously received (denser nets);
- (3) new agencies and services are supplementing rather than replacing the original set of control mechanisms (different nets).³⁹⁰

This process is facilitated by the competing classificatory goals of treatment providers and criminal justice professionals, primarily police and prosecutors. “While clinicians target drug addicts for treatment in an effort to improve their subjective life experience, the criminal justice system casts a wide net in an attempt to facilitate objective improvements in the assumed relationship between drug use, crime, and public safety.”³⁹¹ Accordingly, a system initially targeted at

³⁸⁶ *Id.* at 52.

³⁸⁷ *Id.* at 52–54.

³⁸⁸ *Id.* at 52–54.

³⁸⁹ *Id.* at 41.

³⁹⁰ *Id.* at 44.

³⁹¹ Edwards, *supra* note 93, at 288. Edwards continues:

Unlike traditional classification schemes that target addiction for diagnosis and treatment, the criminal justice system is forced to widen its net in an attempt to curtail drug-related crime. A wide variety of individuals are introduced to treatment as a result. Many of these individuals are at a point where outside pressure to seek help is minimal. Some are young, first-time offenders who have been slated for treatment because of a perceived nexus between drug use and criminal activity. Others are steeped in denial or otherwise incapable of assessing or evaluating the competing pressures that are brought to bear when coercion is applied. As compulsory treatment processes widen the net of eligible offenders for treatment, the role of coercion has been redefined from natural consequence to a quasi-therapeutic agent that introduces the offender to treatment and forces compliance during his stay.

drug addicts comes primarily to serve drug users who may or may not be addicted. Treatment programs, in an effort to demonstrate effectiveness, start cherry picking the low-risk candidates who would have been screened out of a traditional diversion system and channeling up and into the criminal justice system the high-risk candidates they were originally designed to serve.³⁹² The system diverts not away from prison, but into a variety of systems of social control.³⁹³

The voluntary account, as we have seen, supports two rationales for engaging in treatment. One is premised upon rational choice theory: the social norms theorist believes that invasive practices, including treatment regimes, are justified so long as they are effective at inhibiting offenders' anti-social behavior.³⁹⁴ Treatment functions as a less formal or non-legal set of norms operating upon the offender, and treatment centers provide an alternative community using peer pressure to ensure behavior conforms to the appropriate norms of law-abidingness.

In light of the court's power to match offenders to more or less incapacitating treatment regimes, it is worth reiterating the centrality of diversion from prison among the liberal justifications for establishing and supporting drug courts.³⁹⁵ If

Id.

³⁹² See Edwards, *supra* note 93, at 287–88

In the criminal justice system, where a wide variety of individuals are slated for one-dimensional treatment programs, non-addicted individuals are forced into treatment while many addicted persons are required to participate in treatment that does not, and indeed cannot, effectuate meaningful recovery. As addicts are blamed for the inevitable failure of this process, treatment facilities sidestep the coercive influences that they so willingly apply to addicted persons. Here, the relationship between net-widening and institutional accountability serves as a serious obstacle to specific and meaningful applications of compulsory treatment processes.

Id.

³⁹³ COHEN, *supra* note 385, at 52–54.

³⁹⁴ See Simon, *supra* note 146, 48–74.

³⁹⁵ See, e.g., Brown, *supra* note 86, at 80–81, 87–88 (noting high rates of imprisonment and punitive sentences as a result of the War on Drugs, and suggesting that drug courts intervene to treat felons); Feinblatt et al., *supra* note 137, at 291–92 (identifying problem to be addressed by drug courts as the burgeoning court dockets and prison population resulting from the War on Drugs); Goldkamp, *supra* note 33, at 943–44 (discussing Miami felony drug court); McColl, *supra* note 57, at 476–77 (discussing same); Hunter, *supra* note 137, at 419–20 (pointing to savings made by using drug courts to divert drug offenders from prison); Hora et al., *supra* note 8, at 462–66 (noting explosion of caseload and prison population due to War on Drugs and suggesting that drug courts are part of a solution to this problem by “[b]reaking the [c]ycle of [d]rugs and [c]rime”). Even where, as with Hora et al., the link between drug courts and diversion from, specifically, prison is not explicitly made, it is strongly implied by suggesting that drug courts respond to the problem of prison overload by addressing addiction. That implication can only be correct, however, if it can be demonstrated that catching

that justification is to be borne out in practice, the court's eligibility criteria must promote the diversion of individuals who are otherwise likely to spend a significant amount of time in prison rather than those likely to receive non-custodial sentences or sentences that require less institutional confinement than that meted out in drug court. By contrast, drug courts will fail as diversionary institutions to the extent that they treat primarily those individuals who would not receive a custodial sentence in any event, or where the drug court's treatment regime proves to be more incapacitatory than the alternatives.

To assess the diversionary claims of drug courts, I shall consider the two oldest drug court programs in the nation: the courts in Dade County, Miami, and in Oakland, California. These programs differ in that Florida drug courts historically favored the pre-plea model,³⁹⁶ whereas Oakland, operating within the limitations imposed by the California diversion statute, favored a post-plea model.³⁹⁷ Both, however, screen out similar types of offenders from the treatment program.

Under the Florida drug court statute, only offenders with no record of violence are eligible for drug court. Offenders who have been convicted of, at most, one prior misdemeanor and who are currently charged with a misdemeanor or third-degree felony are eligible, as are those charged with a second- or third-degree felony for purchase or possession of a controlled substance.³⁹⁸ In

nonviolent drug users, many of whom have no prior record, are likely to graduate on to other drugs likely to result in prison sentences, and that the establishment of a drug court does not have a net-widening effect.

³⁹⁶ Under the Florida statute, the drug court is to serve as a "pretrial intervention program[] for persons charged with a crime, before or after any information has been filed or an indictment has been returned in the circuit court." FLA. STAT. ANN. § 948.08(1) (West 2004).

³⁹⁷ See CAL. PENAL CODE § 1000.1(b) (West 2004); see also *Terry v. Superior Court*, 86 Cal. Rptr. 2d 653, 655 (Cal. App. 1999); *People v. Cisneros*, 100 Cal. Rptr. 2d 784, 785 (Cal. App. 2000). California provides a statutory diversion scheme whereby the defendant is "diverted to a rehabilitation program with judgment deferred and criminal charges dismissed upon successful completion of the program." *Id.*

³⁹⁸ See FLA. STAT. ANN. § 397.334(1) (permitting each judicial circuit in the state to establish a drug court). The eligibility criteria for drug court provide that:

(2) Any first offender, or any person previously convicted of not more than one nonviolent misdemeanor, who is charged with any misdemeanor or felony of the third degree is eligible for release to the pretrial intervention program

. . . .

(6)(a) Notwithstanding any provision of this section, a person who is charged with a felony of the second or third degree for purchase or possession of a controlled substance under chapter 893, prostitution, tampering with evidence, solicitation for purchase of a controlled substance, or obtaining a prescription by fraud; who has not been charged with a crime involving violence, including, but not limited to, murder, sexual battery, robbery,

California, a similar set of restrictions apply: the offender must have committed a nonviolent crime, have no prior conviction for an offense involving controlled substances, and have not participated in a diversion program or been convicted of a felony within five years of the offense charged.³⁹⁹ Furthermore, the offender must be charged with one of a specific list of offenses.⁴⁰⁰

carjacking, home-invasion robbery, or any other crime involving violence; and who has not previously been convicted of a felony nor been admitted to a felony pretrial program referred to in this section is eligible for admission into a pretrial substance abuse education and treatment intervention program . . . for a period of not less than 1 year in duration, upon motion of either party or the court's own motion, except:

....

2. If the state attorney believes that the facts and circumstances of the case suggest the defendant's involvement in the dealing and selling of controlled substances.

Id. § 948.08.

Successful completion of the program mandates dismissal of the charges "in which prosecution is not deemed necessary." *Id.* § 948.08(5)(c). Some of the more notable individuals eligible for diversion to drug court under the Florida statute include Noelle Bush, Governor Jeb Bush's daughter. *See* Dana Canedy, *Daughter of Gov. Bush Is Sent to Jail in a Drug Case*, N.Y. TIMES, July 18, 2002, at A18; *see also* *Jeb Bush Weeps as Drug Remarks Turn Personal*, N.Y. TIMES, May 1, 2002, at A18 (stating that Noelle Bush was to be diverted to drug court after falsifying prescription for pain-killer). Another was Rush Limbaugh. *See* Letter to Roy Black, Esquire, Limbaugh's Attorney, from the Florida State Attorney, at <http://www.thesmokinggun.com/archive/rushletters3.html> (Sept. 5, 2004).

³⁹⁹ CAL. PENAL CODE § 1000(a).

⁴⁰⁰ That list is contained in the diversion statute, CAL. PENAL CODE § 1000(a). Those offenses include: possession of toluene, CAL. PENAL CODE § 381; possession of a controlled substance, punishable as either felony or misdemeanor, CAL. HEALTH & SAFETY CODE § 11,350 (West 2004); possession of a controlled substance that is not a narcotic, punishable as a misdemeanor, *see id.* at § 11,377; CAL. BUS. & PROF. CODE § 4060 (West 2004); soliciting another to possess a controlled substance, CAL. PENAL CODE § 653f(d); possession of marijuana or concentrated cannabis, CAL. HEALTH & SAFETY CODE § 11357 (making possession of concentrated cannabis or marijuana a misdemeanor and mandating that three or more prior convictions for possession, when added to current possession of less than 28.5 grams of marijuana, require diversion to drug treatment program); possession of marijuana while driving an automobile, CAL. VEH. CODE § 23,222(b) (West 2000); cultivation and processing of marijuana for personal use, CAL. HEALTH & SAFETY CODE § 11,358; possession of paraphernalia for ingesting narcotics, CAL. HEALTH & SAFETY CODE § 11,364; being present in a room where a controlled narcotic is being used, CAL. HEALTH & SAFETY CODE § 11,365; forging or altering a prescription to obtain a narcotic drug, if the narcotic is for personal use secured by fictitious prescription, CAL. HEALTH & SAFETY CODE § 11,368; being under the influence of specified controlled substances, CAL. HEALTH & SAFETY CODE § 11,550 (punishable as a misdemeanor); or appearing in public under the influence of a drug or controlled substance, CAL. PENAL CODE § 647(f).

Most drug court programs last a minimum of one year.⁴⁰¹ Yet many of the offenses that render an offender eligible for entry to drug courts in both Florida and California are misdemeanors. In Florida, those offenses that are felonies are not punishable by a prison sentence.⁴⁰² In California, eligibility for drug court is determined by two statutes: the deferred entry of judgment program⁴⁰³ and a post-conviction mandatory diversion program under the Substance Abuse and Crime Prevention Act of 2000 (SACPA).⁴⁰⁴ The deferred entry of judgment program is the older of the two, pre-dating the drug court movement.⁴⁰⁵ Under the deferred entry of judgment program, only those persons charged with one of 12 specified drug offenses may participate in a drug education and treatment program in lieu of undergoing a criminal prosecution,⁴⁰⁶ and none of the listed offenses would

⁴⁰¹ For example, diversion under the California deferred entry of judgment program lasts between eighteen months and three years. *See* CAL. PENAL CODE § 1000.1(a)(3). Diversion under SACPA lasts for between one year and eighteen months. *See* CAL. PENAL CODE § 1210.1(c)(3); *People v. Esparza*, 132 Cal. Rptr. 2d 377, 381 (Cal. App. 2003).

⁴⁰² FLA. STAT. ANN. § 948.08 (West 2004). The Florida Drug Court screening statute limits eligibility to drug court to offenders who have committed a misdemeanor or third degree felony, or at most a second degree felony for purchase, possession, or solicitation of a controlled substance under chapter 893 of the criminal code. *Id.* For purposes of Florida's sentencing guidelines, most third degree felonies are generically given an offense level of one and second degree felonies an offense level of four; none of the drug felonies upon which eligibility for drug court depends have an offense level above five. *See* FLA. STAT. ANN. §§ 921.0.12, 921.0.13. If convicted for these felonies alone, the offender may not be incarcerated in a state prison. *See id.* § 921.0.14. And, the court "shall . . . accord[] weight in favor of withholding a sentence of imprisonment" when the offender's conduct "neither caused nor threatened serious harm" and when "[t]he defendant has no history of prior delinquency or criminal activity or had led a law-abiding life for a substantial period of time before the commission of the present crime." *Id.* §§ 921.001(b)(1), (6). Accordingly, those eligible for drug court would otherwise receive light jail sentences if any custodial sentence was imposed.

The statute replaces the former diversion statute, FLA. STAT. ANN. § 397.12 (repealed 1993). That statute was held to permit diversion for felony purchase and possession of cocaine within 1,000 feet of a school in violation of FLA. STAT. ANN. § 893.13(1)(e)(1). *See Scates v. State*, 603 So. 2d 504, 506 (Fla. 1992). The *Scates* court held that the diversion statute "[did] not limit itself to possessory offenses under chapter 893." *Id.* This was a departure from prior appellate decisions. *See State v. Edwards*, 456 So. 2d 575 (Fla. App. 1984) (holding that FLA. STAT. ANN. § 397.12 permits diversion only for possession felonies listed under chapter 893); *State v. Raphael*, 469 So. 2d 812, 813 (Fla. App. 1985) (holding the same). It was immediately distinguished, with some contortions, by the lower courts. *See State v. Manning*, 605 So. 2d 508, 510–11 (Fla. App. 1992).

The new statute appropriately limits itself.

⁴⁰³ CAL. PENAL CODE §§ 1000–1000.8 (West 2004).

⁴⁰⁴ *Id.* §§ 1210–1210.5.

⁴⁰⁵ California has had a drug diversion program extending back to 1972. *See B.W. v. Board of Med. Quality Assurance*, 215 Cal. Rptr. 130, 134 (Cal. App. 1985).

⁴⁰⁶ *See* CAL. PENAL CODE § 1000(a); 2001 OPS. CAL. ATTY. GEN. 85, OPINION NO. 01-

result in imprisonment in a state prison. Under the SACPA, which is concerned with offenders convicted of offenses relating to drug possession, only nonviolent offenders may be diverted to drug court, but every nonviolent offender charged solely with drug possession must receive, in the first instance, a non-custodial sentence.⁴⁰⁷

The additional criteria imposed for diversion to drug court in both Florida and California—that the offense committed be nonviolent, that there be no recent record of violence, that there be only a limited history of prior convictions for drug use—suggest that any potential sentence, even for the felony charges, would fall far short of the usual maximums and potentially require detention for a matter of days rather than months.⁴⁰⁸ While any jail time is onerous, the sort of sentence to be imposed under the Florida and California statutes bears no relation to the lengthy sentences that cause most concern to most opponents of drug sentencing laws.

207. Among the drugs the possession of which precludes eligibility to drug court is PCP. *See* CAL. HEALTH & SAFETY CODE § 11,550(g) (West 2004) (prohibiting eligibility for possession of drug listed in CAL. PENAL CODE § 11,055(e)(3)). “The diversion law is confined to prosecutions for enumerated narcotics offenses; it does not extend to other crimes even when charged concurrently with an enumerated narcotics offense.” *Harvey v. Superior Court*, 117 Cal. Rptr. 383, 384 (Cal. App. 1974)

⁴⁰⁷ CAL. PENAL CODE §§ 1210, 1210.1; *see also* Rosenblum, *supra* note 70, at 1220–21 (claiming that “[t]hese initiatives eliminate judicial discretion in sanctioning as well as prosecutorial discretion in the determination of which defendants will participate in the program”). Rosenblum is not quite correct in her claim on prosecutorial discretion: the option of a non-custodial sentence may simply be another factor to be considered in the prosecutor’s charging decision, and may result in the prosecutor bringing additional charges to render simple possession unavailable. *See* CAL. PENAL CODE § 1210.1 (stating that an offender is not eligible for probation under the SACPA if convicted for a non-drug misdemeanor or any felony); *see also* *People v. Esparza*, 132 Cal. Rptr. 2d 377, 382–83 (Cal. App. 2003). (“The statute does not include any language applicable to defendants on probation for nondrug crimes. All of the provisions barring incarceration for probation violators refer solely and explicitly to defendants on probation for drug crimes. It is the underlying offense that controls.”); *People v. Goldberg*, 130 Cal. Rptr. 2d 192, 196 (Cal. App. 2003).

In *Esparza*, the California Court of Appeals held that a court’s discretion in sentencing was also relevant. In that case the trial court sentenced the defendant to a prison term for, among other things, vandalism. The appellate court noted that:

This is not to say that the trial court could not have exercised its discretion to reinstate defendant’s probation on the vandalism case in order to permit defendant to take advantage of the Proposition 36 programs in the felony drug case. The important point, however, is that the trial court was *not required to do so*.

Esparza, 132 Cal. Rptr. 2d at 382.

⁴⁰⁸ Judges interviewed by Nolan confirm this point. *See* NOLAN, *supra* note 3, at 56 (“‘I have people in my program who have already spent more time in jail than they would have spent had they just pled straight’” (quoting Judge Strickland of Roanoke, Virginia)).

The sentences required under the Florida and California statutes are not an alternative to the draconian sentences mandated by the War on Drugs but primarily to sentences that are little more than slaps on the wrist for low-level offenders.⁴⁰⁹ More lengthy sentences in drug court as opposed to prison may be bad enough, depending upon the type of incapacitation imposed by the drug court; however, there is a severe risk that drug courts operate to channel into the court those offenders who would otherwise escape the criminal justice system. Timothy Edwards and Judge Morris Hoffman have been two outspoken critics of this net-widening process.⁴¹⁰

In terms of incapacitation, Timothy Edwards argues that, as of the year 2000, there is still a paucity of the much-needed empirical research on the relation between coercion and therapy.⁴¹¹ One measure of the coercive or incapacitative nature of drug courts is the type of rehabilitation program available; another is what type of offender is matched with what program. Depending upon whether an offender is evaluated under the disease or volitional paradigm, his or her suitability for treatment may vary. Some treatment regimes, such as therapeutic communities, self-evidently require a great deal of incapacitation and coercion as part of their therapeutic program. Others do not. On a given occasion, it may be difficult to determine with great specificity which treatment regimes are

⁴⁰⁹ To be sure, matters are different in other jurisdictions. In New York state, in particular, the Rockefeller Drug Laws result in notoriously high sentences for relatively minor amounts of drug possession. In such circumstances, the incarcerative effects may well outweigh any reservations appropriate to the length of a drug court program. As we shall see, a retributivist approach would account for such differences in assessing the desirability of diversion to drug court over the comparative prison sentence.

⁴¹⁰ See Hoffman, *Scandal*, *supra* note 13, at 1503–04; Edwards, *supra* note 93, at 338–39, 287–88.

⁴¹¹ See Edwards, *supra* note 93, at 336–37. He suggests:

[T]here is a need for a ‘typology’ of pressures that can be applied to the addict and an increasingly refined understanding of the differential effects of such pressures. Further, there is a need to study the interaction effects of coercive strategy and patient characteristics.

... As it stands, most of the existing research “has failed to take . . . into account [the complex relationship between various types of coercion and individual offender characteristics]—either in theoretical terms, or simply in acknowledging the diversity of criminal justice and treatment settings in which legal pressure is used, and the individual differences among treatment-mandated offenders.” Again, the literature does not address the very real probability that coercion *encourages* attrition and false compliance, thus leaving researchers with an incomplete account of total effects of coercion on treated populations. The gap in existing research would be filled by studies that identify those individuals who respond well, or not at all, to varying gradations of coercion, and the type of treatment that is most effectively backed by the criminal sanction. At present, this information does not exist.

Id. (footnotes omitted).

predominantly therapeutic and which are better described as coercive, which offenders are pathological and which rational.⁴¹²

Furthermore, while many of the extant studies focus on various treatment programs, there is little investigation of the incapacitatory nature of the drug treatment process itself.⁴¹³ For example, drug testing is supposed to incapacitate. Its purpose is to ensure addicts do not use drugs. Testing can be accomplished in a manner that is time consuming and may be part of a program designed to remove the addict from his or her community—often on the theory that the addict's community is the most serious barrier to rehabilitation and the greatest cause of relapse. Taken together, these treatment tactics may have an extremely incapacitatory impact.⁴¹⁴

The court may also use a variety of incapacitatory sanctions to enforce compliance. These sanctions, as we have seen, are often imposed as part of a contract between court and offender, although as we have also seen, the court exercises tremendous discretion in determining whether the offender has breached the contract and is self-consciously not bound by the requirements of due process when making that determination. Rather, the role of the contract is to ensure the requisite consent to the program and to justify all subsequent coercive steps. Under the therapeutic model, the contract provides the first stage of behavior modification by requiring the offender to internalize the norms that will be more or less coercively applied should she fail to abide by the terms of the contract.⁴¹⁵

If measured purely on the invasive ability to supervise and incapacitate potentially law-breaking offenders: from the crime-control perspective, too, far from being a disaster, drug courts appear, superficially at least, to be a major success. It is immaterial whether the individuals selected for drug court are addicts or whether they are cured.⁴¹⁶ All that matters is that they end up in the appropriate form of carceral regime, whether inside or outside of prison, and that they spend a significant amount of time there. The available research somewhat supports the drug courts' success by this measure. Drug court advocates often maintain that offenders spend more time in drug court than they would in prison.⁴¹⁷ According to Judge Hoffman, many individuals who would avoid the

⁴¹² *Id.* at 336–37.

⁴¹³ *Id.* at 363–67.

⁴¹⁴ See, e.g., Hora et al., *supra* note 6, at 510–11, 484, 495, 501 (noting that frequent drug testing is part of drug court program).

⁴¹⁵ See, e.g., Winick, *supra* note 189, at 227–30.

⁴¹⁶ Indeed, under the neo-rehabilitative version of administrative crime control, these offenders are incapable of cure.

⁴¹⁷ See NOLAN, *supra* note 3, at 56.

criminal justice system altogether are now caught in its net for more or less lengthy periods of time.⁴¹⁸

It is by no means obvious, then, that drug courts result in less time spent under court supervision than in a traditional court system. In fact, drug courts began and operated for many years under the pre-existing diversion statutes—statutes already in force at the height of the War on Drugs' incarcerative zeal.⁴¹⁹ The diversionary justification of drug court thus depends upon arguing that differences on the scale of days in prison justify the drug court model rather than differences in years. This is a perfectly logical position. Nonetheless, given the de minimis nature of the potential sentence, drug courts are not in the vanguard of the fight against exceptionally punitive drug sentences. Drug courts are not emptying the prisons of nonviolent narcotics addicts sentenced to lengthy prison sentences, at least not in Florida and California.

In considering whether drug courts require less confinement than a jail sentence, it is important to recognize that jail and prison are not the only locations of incapacitation in the criminal justice system.⁴²⁰ Part of the drug courts' appeal may be the manner in which they disperse and transform detention and surveillance, moving them outside the jail and into a set of more or less privately provided settings. These different treatment sites may be inherently incapacitatory and require the offender to remain under observation in a designated place, such as a probation center or drug clinic, for more or less extended periods of time.⁴²¹ In addition, these incapacitatory sites require expenditures of travel time. Although travel may be less onerous because unsupervised, it still serves some of the goals of incapacitation.

The phenomenon of net-widening ought not to surprise social norms theorists eager to exploit the experimentalist potential of administrative agencies in general and drug courts in particular.⁴²² The experimentalist posture is designed to render administrative agencies more sensitive to the particular norms and needs of the local communities served by the various administrative offices, and less in thrall

⁴¹⁸ Hoffman, *Scandal*, *supra* note 11, at 1503–04; *see also* NOLAN, *supra* note 3, at 202–203.

⁴¹⁹ To divert people from lengthy terms in prison, new statutes would be required that permitted diversion for felonies with high mandatory minimum sentences. The *Scates* court held that the Florida diversionary statute permitted discretion to the judge to divert despite a minimum three-year sentence required in a different chapter of the code. *Scates v. State*, 603 So. 2d 504, 506 (Fla. 1992) (holding that because the word “mandatory” did not appear alongside the requirement of a three-year minimum sentence, the alternative existed of participation in a drug rehabilitation program). That decision was abrogated by legislation within one year.

⁴²⁰ *See, e.g.*, Boldt, *supra* note 13, at 1242 (noting that therapy can, from the perspective of the offender, appear punitive).

⁴²¹ *See* NOLAN, *supra* note 3, at 41, 44–45.

⁴²² *See, e.g.*, Dorf & Sabel, *supra* note 31.

to the influence of bureaucrats and repeat players.⁴²³ As my colleague Jamieson Colburn has pointed out, however, the problem with experimentalism in the administrative context is that it fails to account for the manner in which different but interacting agencies preserve their own area of competence and institutional agenda through rule “cascades” that determine institutional priorities and interpretations of the overarching administrative rules or regulations.⁴²⁴ Simply put: in selecting drug courts as a model of experimentalist responsiveness to local norms, social norms theorists may well ignore the manner in which the police, treatment providers, and other executive or quasi-administrative agencies fail to adopt the court’s administrative or therapeutic goals, instead using the court to pursue their own administrative or bureaucratic interests. In this manner, diversion works to “widen the net” by providing the police and prosecutor with a costless alternative to dismissal for those cases that would not go to court.⁴²⁵

VII. EVALUATING DRUG COURTS

Heretofore, I have been concerned to describe the different ways in which drug courts fit under each of the three models of criminal justice: crime-control, penal-welfarist, and due process and their modern variants. My claim is that drug courts appeal to a wide audience of criminal justice professionals and policy-makers because they are presented as an alternative to incarceration that works to divert, to treat, and to incapacitate all at the same time. The drug courts’ appeal, therefore, depends on their claim to promote, at significant points, the values represented by one or other—or all—of the three crime-control categories.

In this section, I consider how the dominant justification of drug courts in legal practice—the therapeutic model articulated by drug court judges—fares under the social norms and legal liberal versions of crime control and due process.

A. *Three Models of Evaluation*

Social norms and neutral legalist theories appear compatible with one major justification of drug court: it is a participative institution that operates with the consent of the offenders in its care. So long as the offender consents to and participates in the drug court process, then there is no problem: under the social norms version of crime control the court and offender participate in promoting law abiding social norms; under the neutral liberalism model, the legitimacy of the process depends upon equal participation in the norm creation process. It is choice that confers legitimacy. Thus if the offender, while aware of the drug

⁴²³ See, e.g., Dorf & Sabel, *supra* note 45.

⁴²⁴ See Jamison E. Colburn, “Democratic Experimentalism”: A Separation of Powers for Our Time?, 37 SUFFOLK U. L. REV. 287, 335–42, 383–92 (2004).

⁴²⁵ This is essentially Cohen’s point. See COHEN, *supra* note 385, at 41–55.

court's procedural shortcomings, still chooses to enter the drug court program, she should not object to the courtroom practice once she has started the program; if it is not what she thought it would be, she can always drop out and return to the traditional court system. On both models, then, consent appears to remedy any substantive defect in the legal process afforded.

Both social norms and therapeutic conceptions of criminal justice insist upon responsiveness to the needs or norms of the community and the offender. This participative responsiveness justifies greater executive and adjudicative discretion and intervention so long as the drug court process manifests the requisite quality and quantity of participation as a sufficient guarantee of legitimacy. The issues for due process advocates, however, are participation in what; is participation meaningful; and who gets to assess and ensure the appropriate level of participation? Accordingly, from the liberal legal perspective, the major objection to drug court is with the power of the judge-as-expert; problems arise when the offenders' views are discounted as inappropriately law-breaking or in conflict with the dominant therapeutic discourse or as antithetical to the social influence of the judge or the therapeutic relationship between judge and offender.

1. Participation: Empathy, Heroism, and the Judge-as-Expert

The due process critique is primarily concerned with providing a series of checks and balances on the power of the state, as asserted by the prosecution and the judge. Generally, the judge is constrained to a passive role, adjudicating the adversarial contest between the prosecution and a defense counsel charged with the task of zealously representing his or her client. Neutral liberals would require even sentencing to conform to an objective, pre-determined standard. Moral liberals permit the judge some discretion in sentencing on the grounds that the judge is as much an expert in determining moral accountability as anyone.⁴²⁶ Furthermore, because the process is public and the judge is required to justify the sentence during an adversarial proceeding, there are constraints of transparency upon the process. The judge, on either model of legal liberalism, maintains her neutrality and rejects the notion that she is somehow more expert in determining the appropriate punishment than the law person.

Under the social norms version of crime control, judicial discretion is to be delayed as long as possible so as to promote police and prosecutorial discretion and sensitivity to local norms on the ground. Where judges act in a discretionary manner, they ought to do so in a way that is transparent to those local norms. In turn, these norms determine the manner in which the court is to treat the offender.

Judged by these standards, drug court practice is a failure. The current drug court model presents serious problems for due process and social norms advocates. One way of explaining the worrisome aspects of the courtroom

⁴²⁶ See, e.g., Lewis, *supra* note 382, at 301–08.

procedures is to borrow the practices of “empathy” and “heroism” identified by Charles Ogletree as central to re-invigorating the practice of law in the criminal sphere.⁴²⁷ Empathy is other-directed, requiring “an identification with another person in distress.”⁴²⁸ Heroism is self-directed, comprising “the desire to take on ‘the system’ and prevail, even in the face of overwhelming odds.”⁴²⁹ These ideals are, first of all, “motivation[al].”⁴³⁰ Empathy and heroism, however, may justify highly invasive types of court procedure when unchecked by some due process separation of roles.

Drug courts must be understood as self-consciously empathetic and heroic institutions. They arose in direct response to the War on Drugs,⁴³¹ and the hugely increased drug-related caseload that initiative has spawned.⁴³² Prior to drug court, the major effort to cope with drug cases was primarily managerial;⁴³³ the expedited⁴³⁴ or differentiated⁴³⁵ case management system. Under the expedited case management model, drug prosecutions were “‘fast track[ed]’ . . . in one courtroom or division of a criminal court.”⁴³⁶ The overriding goal of case

⁴²⁷ Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1271–79 (1993).

⁴²⁸ *Id.* at 1268.

⁴²⁹ *Id.* at 1243.

⁴³⁰ *Id.* at 1275.

⁴³¹ See NOLAN, *supra* note 3, at 44–45.

⁴³² See, e.g., NOLAN, *supra* note 3, at 45 (relating court and prison overcrowding to genesis of drug courts); McColl, *supra* note 57, at 477 (discussing “the heavy caseload weighing down urban courts”).

⁴³³ Prior to the 1980s, the only pre-existing alternative to incarceration was a due process era program of diversion entitled Treatment Alternatives to Street Crime (“TASC”). See *Developments in the Law*, *supra* note 63, at 1899, 1902–07. A range of agencies within the criminal justice system, including prosecutors and probation officers as well as judges, were able to “refer out” offenders to various TASC treatment centers. *Id.* at 1903–04. These state-regulated agencies then monitored the individual offenders’ progress through treatment and “act[ed] as liaisons between courts and independent drug treatment programs.” *Id.* at 1903. Although TASC had a strong rehabilitative element, that rehabilitation was subject to court monitoring, although the court had no direct involvement in the course of treatment. *Id.* The hands-off, diversionary approach of TASC did not fit well within the administrative severity revolution focused on increased criminalization and punitive detention of drug users.

⁴³⁴ See Goldkamp, *supra* note 21, at 946.

⁴³⁵ See Hoffman, *Scandal*, *supra* note 11, at 1461.

⁴³⁶ Boldt, *supra* note 11, at 1210. These courts transformed the manner in which drug cases were processed, resulting in much faster dispositions. See Goldkamp, *supra* note 21, at 946. By creating a division of an existing trial court specializing in drug cases, the drug caseload was consolidated to enable the “concentrat[ion] [of] expertise in one courtroom, and [to] reduce the time to disposition through effective case management.” McColl, *supra* note 42, at 471.

management courts was the "reduction of the pending drug caseload."⁴³⁷ These expedited courts, however, only streamlined the court process rather than addressing the size of the drug-related caseload faced by the court system.

In reaction to their increasingly negative experience of the criminal justice system, a growing cadre of judges⁴³⁸ recognized that an alternative to traditional case processing methods was required to cope with drug cases.⁴³⁹ The drug court was explicitly envisaged as a direct response to the proliferation of court caseloads, the "revolving door" style of drug prosecution, and the progressive prison overcrowding resulting from the War on Drugs.⁴⁴⁰ "[T]he common refrain from drug court officials [is] 'What we were doing before simply was not working.'"⁴⁴¹

The drug court attempted to engage in the therapeutic rehabilitation of addicted offenders. This is an expressly empathetic and heroic enterprise. The therapeutic posture of the drug court permits the judge to envision themselves as risk-taking administrators at the forefront of the struggle to undo the damage of both drug abuse and the War on Drugs. Many drug courts were started by judges: some receive funding secured by the judges from private sources.⁴⁴² In all of these courts, as a hero of the oppressed, the legal agent finds reasons for attacking or disregarding social or legal norms that prevent her succeeding in this mission; as an empathic individual, she justifies such reasons in terms of her client's needs

⁴³⁷ McColl, *supra* note 42, at 472.

⁴³⁸ See generally Hunter, *supra* note 137; Hon. William P. Keesley *Feature: Drug Courts*, S.C. LAW., July–Aug. 1998, at 32; McColl, *supra* note 57; Murphy, *supra* note 4; Hon. Steven I. Platt, *Drug Court Experiment: Policy Choice–Political Decision*, MD. B.J., Jan.–Feb. 2001, at 44. See also Hora et al., *supra* note 8, at 462–68; NOLAN, *supra* note 3, at 42 ("In the case of the drug court movement, . . . the major agents of change are . . . the judicial[] actors themselves. 'The Drug Court Movement is essentially a judge-led movement.'" (quoting Philip Bean, *America's Drug Courts: A New Development in Criminal Justice*, 1996 CRIM. L. REV. 718, 720)).

⁴³⁹ See Hora et al., *supra* note 8, at 470–71. ("[T]he theory of the drug court is that caseload pressure should be relieved from other court functions, and resources be saved as a result of an efficient and effective treatment approach." (quoting John S. Goldkamp, U.S. Dep't of Justice, *JUSTICE AND TREATMENT INNOVATIONS: THE DRUG COURT MOVEMENT—A WORKING PAPER OF THE FIRST NATIONAL DRUG COURT CONFERENCE*, DECEMBER 1993 30 (1994)).

⁴⁴⁰ See, e.g., Hora *supra* note 8, at 456–57 ("The genesis of the DTC movement developed in response to the increasingly severe 'war on drugs' crime policies enacted in the 1980s, coupled with the resulting explosion of drug-related cases that subsequently flooded the courts."); McColl, *supra* note 42, at 475; NOLAN, *supra* note 3, at 44.

⁴⁴¹ NOLAN, *supra* note 3, at 44.

⁴⁴² NOLAN, *supra* note 3, at 42.

or goals, as a necessary component of ensuring that the client succeeds against the system.⁴⁴³

Under the empathetic and heroic model of drug court practice, problems arise when the self-directed and other-directed aspects of the legal agent's reconstituted identity do not check each other, but combine to provide justifications for bending or ignoring rules of behavior, legal practice, or ethics.⁴⁴⁴ The potential for the legal agent to "lose sight of the external moral limitations on her conduct"⁴⁴⁵ increases when the legal agent's heroic empathy is not directed towards individual clients but only towards clients as types, manifesting a particular pathology the legal agent understands or empathizes with only as an expert qualified to determine the real conditions that have placed the client in his or her current crisis. Adopting the expert role undermines the major check on the heroic personality: the empathetic requirement of humility in the face of the client's statement of his or her interests.

In the role of authoritative expert, the legal agent may not "hear [her client's] 'complex, multivocal conversations' . . . and . . . integrate [her client's goals] into an evaluation of potential solutions."⁴⁴⁶ Where conceptual or practice-related justifications permit the agent, in the guise of expert, to discount the interests or outcomes that the actual client identifies as important, there is a tremendous potential for the self-directed motivational component to dominate the agent-client relationship.

Finally, it is important to note that Ogletree's endorsement of the twin ideals of heroism and empathy arise in the context of an adversarial contest in which the legal agent is pitted, on behalf of his or her client, against another legal agent. Heroism and empathy apply paradigmatically in the due process context. The major external checks on empathetic and heroic agents are the jury and, where she is not acting under one of the above-mentioned roles, the judge. Both of these are supposed to assess the merits of a situation in a dispassionate and impartial manner. In drug court, however, impartiality is rejected as a judicial virtue and replaced with a partial representation of the best interests of the client.

⁴⁴³ Ogletree, *supra* note 427, at 1276.

⁴⁴⁴ Ogletree also notes that the

heroic motivation may also have its less benign aspects [as when] . . . criminal defense attorneys are often drawn to their work by a kind of voyeuristic desire to experience the 'darker side' of society—to interact with criminals and to learn about their exploits. . . . [Furthermore,] many of our heroic images . . . embody . . . traits . . . that . . . tend to exclude certain groups.

Id. at 1276.

⁴⁴⁵ *Id.* at 1278.

⁴⁴⁶ *Id.* at 1274–75 (quoting Lucie E. White, *Revaluing Politics: A Reply to Professor Strauss*, 39 UCLA L. REV. 1331, 1338 (1992)).

Where empathy and heroism drown out the voice of the drug court offender, the participative guarantee of legitimacy essential to social norms and neutral legalist theories evaporates. It is impossible to say, in a general way, that all drug courts fail the empathy and heroism test: however, the anecdotal evidence provided by many studies of actual drug court practice, including the drug court judges' own testimony, suggests that the focus on contracting-as-coercion-and-consent, "courtroom theater," and "telling the right story"⁴⁴⁷ all operate to mute the real voice of the participant and potentially the local lay community, as opposed to the community of treatment providers. This silencing undermines the localist, participative justification at the core of the social norms embrace of drug courts

Furthermore, for social norms advocates, the consequences of excluding local participation are dire. Legitimacy is a two-way process that requires both that social groups accept the law as generally legitimate and that the law reflect local norms. In this way, groups that accept the law's legitimacy are more likely to follow legal norms no matter what the content of the norm and to informally reinforce these norms in their communities without government intervention. Groups that perceive the law as lacking in legitimacy question the content of individual norms and may conform their conduct to the law only when the sanction attached to non-compliance is sufficiently severe and imminent.⁴⁴⁸ Accordingly, the task of the criminal law is both to ensure its own legitimacy by mirroring social norms specifying appropriate behavior⁴⁴⁹ and to create new norms of appropriate conduct for groups that accept the institutional legitimacy of the law. Participation in the norm creation and norm enforcement process is a central tenet of the social norms theory;⁴⁵⁰ to the extent that the drug court is an expert institution, it is distanced from legitimacy-conferring local participation.

a. *Aesthetic Considerations*

Due process arguments have often been used to limit the impact of judicial discretion in the trial process. Some of these concerns are directed at the provision of an unbiased hearing after notice to the parties. But other arguments—ones that may be denominated aesthetic—concern the type of ceremony afforded the parties: the aesthetic considerations are relevant, not only the expressive impact of

⁴⁴⁷ See NOLAN, *supra* note 3, at 123–26 (stressing the expectation that the participant accept and express particular views in court).

⁴⁴⁸ See, e.g., Meares, *Place*, *supra* note 20; Meares & Kahan, *Inner City*, *supra* note 20.

⁴⁴⁹ See, e.g., Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 205–06 (1996); Paul H. Robinson, *Supreme Court Review: Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 693–95 (1993).

⁴⁵⁰ Meares & Kahan, *Inner City*, *supra* note 20, at 832.

the proceeding and what it communicates about the values underlying the hearing itself. "The issue is not the court's integrity but the criminal process' integrity as a self-regulating legal order. . . . A public trial, if fairly conducted, sends its own message about dignity, fairness, and justice that contributes to the moral force of the criminal sanction."⁴⁵¹

While these aesthetic considerations are particularly the province of liberal legalism, with its focus on discretion-constraining rules, social norms theorists too should be solicitous of such ceremonious rituals. After all, the social norms emphasis on legitimacy and the social meaning of the criminal law are both impacted by the appearance of impropriety in courtroom procedure.⁴⁵²

Another set of related values are those caught under the rubric of "structural due process" and which apply to the manner in which the state respects and acknowledges the parties and the procedures through which we expect the state to speak.⁴⁵³ If the aesthetic concerns address "the business of limit-setting" in the court's conduct towards a criminal defendant,⁴⁵⁴ the structural concerns codify those limits by requiring a particular form of participation when, particularly, the individual's liberty is on the line. The issue of courtroom behavior is important from the due process aesthetic perspective because of the message such behavior communicates to the offender or the world at large about the court's regard for the law and the defendant. As Justice Brandeis has famously put it in his dissent in *Olmstead v. United States*:

If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to

⁴⁵¹ Arenella, *supra* note 28, at 203, 219.

⁴⁵² See, e.g., Kahan, *supra* note 119, at 615–17; Kahan & Posner, *supra* note 119, at 380–83; Lessig, *supra* note 238, at 1006.

⁴⁵³ Neil MacCormick defines legalism as:

[T]he stance in legal politics according to which matters of legal regulation and controversy ought so far as possible to be conducted in accordance with predetermined rules of considerable generality and clarity, in which legal relations comprise primarily rights, duties, powers and immunities reasonably clearly definable by reference to such rules, and in which acts of government however desirable teleologically must be subordinated to respect for rules and rights.

Neil MacCormick, *The Ethics Of Legalism*, 2 *RATIO JURIS* 184, 184 (1989). MacCormick considers legalism as a limit on the "way[s] of conducting government," such that the government may not act on the basis of extra-legal moral, or therapeutic, principles but only act on the basis of antecedently promulgated rules and rights. *Id.* at 185–86. The government's way of conducting itself thus expresses important features about the manner in which it values its citizens.

⁴⁵⁴ Uviller, *supra* note 27, at 1138.

declare that the Government may commit crimes in order to secure the conviction of the private criminal—would bring terrible retribution.⁴⁵⁵

Here, “‘aesthetic’ means a lot more than ornamental.”⁴⁵⁶ It concerns the ability of the legal system both to project its claim to legitimacy and thereby to demand our respect and allegiance. That ability, it appears, need not appeal across a legal system: our willingness to find the law worthy of respect such as to compel our obedience may be limited to the criminal justice system or the tax system or some other discrete area of law.⁴⁵⁷ An essential component of the demand for respect is that the government manifest its respect for law in the manner it treats those brought under its purview. As social norms theorists remind us, “[l]egitimacy . . . is rather uniquely in government control.”⁴⁵⁸ The theater of the courtroom, on this view, is not a place for acting out or for acting on the parties but rather for acting with due respect for their individuality and humanity. “Due process plays an important role in this structure.”⁴⁵⁹ At the very least, it requires the court to treat the offender as an agent capable of rational choice, and thereby guarantees the offender’s continued participation in the process of treatment and punishment required by neutral liberal theories of justice.

The importance of due process protections for creating legitimacy is amplified when we recognize that many of the offenders entering drug court are socially disadvantaged or members of racial minorities or both. Statistical evidence suggests that poorer offenders are more likely to agree to go to drug court than rich ones.⁴⁶⁰ The increased likelihood of the poor to plea or waive rights to enter drug court is perhaps a reflection of the “differential impact of inadequate assistance of counsel” during the plea process.⁴⁶¹ The differential impact of the criminal justice system on poor individuals may be exacerbated for minorities, who are much more likely to receive incarcerative sentences than non-minorities.⁴⁶² Such factors may lead poor and minority defendants to accept diversion into drug court where others would not. It is, however, impossible to be any more precise or avoid broad generalizations because there is a paucity of

⁴⁵⁵ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

⁴⁵⁶ *Uviller*, *supra* note 27, at 1138 n.3.

⁴⁵⁷ We may be justified in disobeying particular laws, on this view, not because the legal system on balance is a bad one. Compare JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); LON L. FULLER, *THE MORALITY OF LAW* (1964); JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979). Rather, we may be justified because the criminal law is, on balance, so bad that we are not obliged to follow its prescriptions.

⁴⁵⁸ Meares, *Norms*, *supra* note 158, at 399.

⁴⁵⁹ *Uviller*, *supra* note 27, at 1138 n.3.

⁴⁶⁰ See, e.g., Bedrick & Skolnick, *supra* note 50, at 43.

⁴⁶¹ Boldt, *supra* note 222, at 2318.

⁴⁶² *Id.* at 2318–19; see also Brown, *supra* note 86, at 73–75.

research on the impact of race and poverty on drug court procedures. The circumstantial evidence does, however, suggest that drug courts screen in people who are not addicts, but who, for a variety of reasons, calculate that their chances of successfully participating in treatment will lead to dismissal of the charges against them.

Transforming the judicial treatment of, in particular, poor and minority criminal defendants was an essential part of the Warren Court's procedural revolution. Then, as in drug court, the courts practiced penal-welfarist techniques upon the poor and disposed, individuals for whom society had no regard. In drug court, the issue is not only to establish when and if court solicitude for effecting a therapeutic transformation is converted into something less benign, but to consider whether the system of rewards and punishments and the unbridled discretion enjoyed by the courts is more pantomime than theater. That determination has to be made on a case-by-case, or judge-by-judge, basis. Where the pantomime is preferable to imprisonment, it may be thought worth the price of diversion. Nonetheless, and especially when racial and class issues are added into the mix, the drug court's procedure may inflict a cost on the dignity of the offender or the legal system that is too high to pay.⁴⁶³

b. *Structural Considerations*

The requirement of participation is, however, meaningless until given some form of content. The provision of a hearing is potentially useless unless the structure of that hearing is such that it ensures participation in the process. That, in short, is one of the major neutral liberal critiques of drug court.

Structural due process analysis comports with neutral liberalism by going beyond the various substantive and procedural critiques that may be leveled against the drug court. On the substantive end, penal welfarists and due process advocates would agree that drug addicts are entitled to treatment, so long as the period of rehabilitation is not too excessive, nor seeks to undermine the identity of

⁴⁶³ Professor William Stuntz has suggested that dignity may not be a significant interest in criminal procedure, especially when compared with defendants' privacy rights. William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1037 (1995) (suggesting that a consistent protection of dignity rights would undermine the present system of criminal procedure). Instead, he suggests, courts generally do not focus on "the indignity of being publicly singled out as a criminal suspect," *id.* at 1064, or the "stigma" of being publicly targeted by the police. *Id.* at 1066. Rather, the courts focus upon privacy and information gathering, to the exclusion of other dignitary interests. *Id.* at 1065. While that may be the prevalent, current focus on criminal procedure, I would suggest that, in the context of the Warren Court's jurisprudence, a notion of individual dignity, generally articulated through concepts of autonomy, respect, equality, and freedom from undue government interference, was at the heart of a jurisprudential and moral outlook that resulted in the reform, not only of criminal procedure, but of the various institutions more or less directly linked with the criminal justice system, including juvenile courts, prisons, and mental institutions.

the individual. Similarly, so long as proportionality is not at issue, the onerous nature of the sentence imposed may be acceptable to due process advocates and adherents of the administrative model alike. On the procedural end, due process demands that the government hear the drug court defendant⁴⁶⁴ and that the hearing embody a fundamentally fair method of ascertaining the truth of the matter at hand.⁴⁶⁵ In the drug court as currently constituted, some form of hearing is provided and, depending on the judge, it may be perfectly neutral and unbiased. Accordingly, the greatest concern is not the absence of procedural protections. Rather, it is the structure of the drug court process that is problematic.

The Supreme Court's opinions in *Kent v. United States*,⁴⁶⁶ *In re Gault*,⁴⁶⁷ and *In re Winship*⁴⁶⁸ comprise a full-blown rejection of a prior, welfarist-style court from the due process model's structural perspective. The Court was disturbed by the penal-welfarist uncoupling of the process of adjudication from the decision to deprive a juvenile of her liberty. In *Gault*, for example, the Court found that, in the guise of protecting parent, or *parens patriae*, the juvenile court system had instead adorned itself with "unbridled discretion" over the juveniles in its custody.⁴⁶⁹ This arrogation of power without due process limits, however, "resulted not in enlightened procedure, but in arbitrariness."⁴⁷⁰ Rather than simply providing a hearing, the Court sought to reattach a fully developed notion of due process to the juvenile justice court. Central to that process was some conception of the manner in which the juvenile could participate in the proceedings.⁴⁷¹ The Court saw its task as one of fleshing out the appropriate form of participation—upon what basis a democratic society could justify depriving a child of her liberty.

At the center of the Supreme Court's evaluation of the juvenile court's penal-welfarist procedures was *Kent*'s concern that the state provide the requisite ceremony before depriving juveniles of liberty.⁴⁷² An unbiased hearing, by itself, is not enough. Rather, the court cannot "reach[] a result of such tremendous

⁴⁶⁴ On the necessity of a hearing, see Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 281–83 (1975).

⁴⁶⁵ *Id.* at 289.

⁴⁶⁶ 383 U.S. 541 (1966).

⁴⁶⁷ 387 U.S. 1 (1967).

⁴⁶⁸ 397 U.S. 358 (1970).

⁴⁶⁹ *In re Gault*, 387 U.S. at 18; see also *id.* at 15–16 (discussing rejection of inquiry into guilt or innocence and replacement with inquiry into, "[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career").

⁴⁷⁰ *Id.* at 19. On the *parens patriae* and judicial arbitrariness, see also *Kent*, 383 U.S. at 554–55.

⁴⁷¹ *Kent*, 383 U.S. at 553–54.

⁴⁷² See *Kent v. United States*, 383 U.S. 541, 554 (1966).

consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.”⁴⁷³ Especially where liberty rights are at stake, the process utilized by the court must be one in which the government treats the defendant as a participant in a democratic process. The structural due process analysis, especially insofar as it is focused upon the form of policy application, is therefore especially helpful in revealing what is so unsettling about drug court procedure and policy. Simply put, there are some areas of law “where governmental policy . . . application [is] . . . required to take a certain *form*, to follow a process with certain *features*, or to display a *particular sort of structure*.”⁴⁷⁴

The due process critique thus concerns itself, not only with the provision of a hearing, but the structure of the hearing provided and constrains the tribunal to act in a particular way—to recognize that the enterprise of governing by means of published rules requires that decision be rendered based upon those rules. The court cannot rule on the basis of assumptions or arguments not presented by the government or simply choose to ignore the citizen’s arguments.⁴⁷⁵ Rather, structural due process demands a particular form of response from the adjudicative institution, whether it is a court, a sentencing tribunal, or a parole revocation hearing: a response that respects the parties’ demand for rational engagement with the arguments presented, placing judge, prosecutor, and defendant in a “kind of reciprocity” with each other,⁴⁷⁶ constrained to defend and discuss their different positions in terms that respect the others’ arguments and reasons, and to respond to them with arguments and reason of their own.⁴⁷⁷

⁴⁷³ *Id.*

⁴⁷⁴ Tribe, *supra* note 464, at 291 (emphasis added); see also Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 192 (1999) (discussing *City of Chicago v. Morales*, 527 U.S. 41 (1999)).

⁴⁷⁵ See, e.g., *Kent*, 383 U.S. at 561 (requiring trial court to undertake review of actual arguments presented rather than rest upon assumptions that there may be adequate reasons for the parties’ actions).

⁴⁷⁶ FULLER, *supra* note 457, at 39–40.

As the sociologist Simmel has observed, there is a kind of reciprocity between government and the citizen with respect to the observance of rules. . . . When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen’s duty to observe the rules.

Id. (citing THE SOCIOLOGY OF GEORG SIMMEL § 4, at 186–89 (1950)).

⁴⁷⁷ See *Kent*, 383 U.S. at 561 (“Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. . . . Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor.”).

In such a relationship, “the processes and rules that constitute the [adjudicative] enterprise and define the roles played by its participants matter quite apart from any identifiable ‘end state’ that is ultimately produced. . . . [I]n many cases it is the process itself that matters most to those who take part in it.”⁴⁷⁸ The process matters because it is a form of “dialogue between the state and those whose liberty its laws confine, a dialogue in which the continuing legitimacy of a law turns on the current willingness and ability of the state to come forth with rational justifications for the law’s continued enforcement.”⁴⁷⁹ Due process protections afford the defendant, in presenting arguments to the tribunal, the opportunity to take part in its determination and requires that, at a minimum, the tribunal consider those demands in rendering its verdict.

c. *Due Process and the Judicial Role*

The therapeutic approach not only undermines various checks upon judicial restraint, it also promotes confusion over the use of punishment and the status of the addict in the criminal justice system. The particular treatment methodology used in drug courts does not attempt to separate punishment from treatment but rather conflates the two.⁴⁸⁰ Drug courts muddle the determination of when it is proper to impose punishment by permitting the re-characterization of punishment as treatment appropriate for curing the addict. Adopting a retributivist understanding of punishment and treatment would dispel the muddle by requiring us to determine when punishment is not violative of an individual’s interests or rights but a means to restore the individual to a position where she can appropriately choose her interests or properly exercise her rights.

The type of retributivism I am proposing here is what might be called a humble or “holistic” retributivism.⁴⁸¹ It requires us to consider whether the offender has sufficient volitional capability to act as a rational or responsible human. If so, we are precluded from simply ignoring the offender’s moral culpability and turning to the perspective of treatment. Instead, we must at least

⁴⁷⁸ Laurence H. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 631 (1973).

⁴⁷⁹ Tribe, *supra* note 464, at 301; *see also* Powers v. Ohio, 499 U.S. 400 (1991). Although primarily concerned with institution of the jury, rather than administration itself, the Court stressed, “[t]he opportunity for ordinary citizens to participate in the administration of justice [is] . . . one of the principal justifications for retaining the jury system.” *Id.* at 406 (citing Duncan v. Louisiana, 391 U.S. 145, 147–58 (1968)). Where that participation is undermined—in this case—by “racial discrimination in the selection of jurors [it] ‘casts doubt on the integrity of the judicial process,’ and places the fairness of a criminal proceeding in doubt.” *Id.* at 411 (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)).

⁴⁸⁰ *See* Edwards, *supra* note 93, at 288.

⁴⁸¹ Husak, *supra* note 384, at 994–1000 (describing the holistic aspects of retributive justice).

consider the relevant social harm—often, in the case of drug court offenders, simple drug possession—and determine what, substantively, we think the appropriate punishment should be.

It may be that, like Randall Kennedy, the disparate impact of drug abuse on certain addicts in general and minority communities in particular justifies the imposing a severe sentence for drug crimes.⁴⁸² Kennedy reminds us that many of the individuals—including minorities—who supported the crack cocaine legislation believed disparate sentencing laws were justified given the effect on the urban, minority communities they represented.⁴⁸³ Such a justification may be insufficient to harshly punish the offense of possessing drugs like marijuana or even justify the year-long period of drug court supervision. Under the retributivist model, then, moral considerations are always relevant in determining both the moral status of the offender and of the institution punishing her. Any form of detention or confinement must be justified by reference to the offender's moral status and the harm suffered by the community, both in terms of imprisoning and in terms of setting free the offender. The content of that moral status may be contested; that does not mean that the attempt to determine that status is futile or useless. Rather, it manifests the necessary degree of institutional respect for the individual and her situation.

Drug courts may comport with due process by adopting appropriate criteria to match offenders with treatment regimes. The traditional role of due process has been to provide a limit on the manner in which the quasi-therapeutic regimes employed by penal welfarists act upon the person of the offender. Publishing the available sanctions is one step along the due process road. Excluding non-addicts from treatment or recognizing that, for non-addicts, treatment is punishment is another step. The due process approach to drug courts demands, however, that courts rigorously interrogate the therapeutic principles upon which they are founded so as to constrain the power of the judge and regard the process of treatment as potentially harmful rather than uniformly therapeutic. This type of self-reflection is one that drug court advocates, caught up in the evangelical phase of the movement, have proved unwilling to do.

Rather than transform herself into a therapeutic agent, the due process model suggests that the power of a judge should be limited to the consistent imposition of sanctions.⁴⁸⁴ Where treatment is necessary and appropriate, the judge's role is to match offender to treatment, according to the advice of an expert. The expert, in turn, must be required, if the offender asks, to justify her choice of treatment

⁴⁸² See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994).

⁴⁸³ *Id.* at 1260–61; Randall Kennedy, *A Response to Professor Cole's "Paradox of Race and Crime"*, 83 GEO. L.J. 2573, 2575 (1995); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1295 (1995).

⁴⁸⁴ See, e.g., Hampton, *Liberalism*, *supra* note 163, at 168–76.

modality. This returns the judge to her role as passive arbiter of the equities. Even this narrow set of powers permits the court to function along the lines suggested by Professors Dorf and Sabel, as an experimentalist institution supervising competition among treatment providers to provide the most effective rehabilitation program. Because the due process model places great stress on the type of offender channeled into treatment and the type of treatment offered, due process places the same, or even greater, stress on collating the sort of information Dorf and Sabel regard as essential to the experimentalist project, requiring as it does a broader data set to properly evaluate the impact of drug courts. But the due process model also suggests that we must do more than hope that drug courts are better than the alternatives. Due process cannot tolerate an exercise of judicial power that undermines the participative aesthetic and structural values upon which our courts rest.

VIII. CONCLUSION

Drug courts clearly engage in moderate forms of incapacitatory discipline under the rubric of therapy. Some drug court judges acknowledge that offenders spend more time in prison as a result of electing drug court than if they simply chose to proceed through the criminal justice system. Even outside prison, drug courts require offenders to spend large amounts of time at institutions connected with the court. Judge Susan Bolton, of the Phoenix, Arizona, drug court makes the point well:

We make them spend at least three hours a week in our group [therapy sessions]. We make them spend at least two more hours a week in a 12-step meeting. We make them do their community service hours. We require them to report all the time to their probation officer. We require them to call TASC on a daily basis. And if they don't do what they are required to do, they suffer a consequence.⁴⁸⁵

Drug courts are designed to incapacitate. That is an essential component of their treatment program. Perhaps it must be so, given the nature of drug addiction. Nonetheless, given their incapacitatory function, drug courts put opponents of the tough-on-crime, War on Drugs movement in a quandary. Either they must reject drug courts outright on principled grounds.⁴⁸⁶ Or, they must develop a more sophisticated approach to incapacitation.

My proposal has been to focus on maintaining the autonomy and dignity of the offender in the criminal justice process, as well as the dignity and integrity of the process itself. These are particularly due process concerns. They may compete with other due process considerations, such as ensuring that the punishment is

⁴⁸⁵ NOLAN, *supra* note 3, at 55 (alteration in original).

⁴⁸⁶ See Hoffman, *Scandal*, *supra* note 13, at 1477.

commensurate with the crime. They may also compete with penal-welfarist or administrative values. Nonetheless, autonomy and dignity provide one scale upon which to measure the trade-off between incapacitation in prison and incapacitation in a drug court.

It may well be that drug courts are, by and large, preferable to prison. It may be that certain prisons, or certain periods of confinement, are preferable to a drug court's therapeutic regime. That conclusion cannot be reached without much more information pertaining to both local prison or jail conditions and the types of treatment meted out in drug court.

If the drug court suggests that traditional courts fail to engage in any meaningful manner with offenders, then the due process model can be used to refine that critique. Traditional courtroom practice should become more personal or empathetic in ways that recognize and respect the offender's dignity and humanity. The lesson of drug courts is that our courts of criminal justice should be concerned with understanding and demonstrating a commitment to the particularized and respectful treatment of every individual brought before the court. The judge can still take the lead and can still preserve a group effort of respect and engagement but can do so in a way that does not rest upon befriending the offender. The failure to do so is in part a result of the tremendous pressures on our criminal courts to process offenders but is also in part due to a failure of the judicial imagination.

The problem for the drug court advocate, then, is whether the therapeutic judicial role is a sufficient price to pay for the type of diversion and treatment offered by drug courts. Many, though not all, drug courts endorse a version of judicial practice that, on the one hand, gives the judge huge discretion over the manner in which the offender is treated and, on the other hand, constrains the offender to interact with the judge in a narrowly circumscribed manner. This is not empathy. The problem is that the best-intentioned judges, the most sincere advocates of the disease model of addiction, are the ones most likely to transform this process into a deeply invasive and incapacitating form of supervision based primarily upon the offender's consent. The issue of consent diverts attention from the front-end problems of net-widening: channeling otherwise exempt offenders into the system and requiring extensive treatment programs for those that may least need it. Further, the emphasis on diversion and rehabilitation avoids the major issue surrounding the War on Drugs: whether its goals or methods are substantively justified at all.

Adopting the drug court compromise as a way of combating the effects of drug legislation is a deeply problematic means of stanching the flow of low-level offenders into our criminal justice system. It works, if at all, by redirecting offenders into a treatment system that may pose significant, perhaps increased, hardships on offenders. In the face of these practical and political problems, the traditional criminal justice system—punishment, incarceration, and all—may be preferable to the invasive and often incapacitatory judge-led attempts to

rehabilitate offenders through internalizing norms that many in society find unfair and unwarranted.